

3
No. 2576

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JAMES B. SMITH, F. C. MILLS and E.
H. MAYER,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

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Statement.

On February 27, 1913, an indictment was presented in the District Court against eight defendants, namely, John L. Howard, James B. Smith, J. L. Schmitt, Robert Bruce, Sidney V. Smith, F. C. Mills, E. H. Mayer, and Edward J. Smith. The charge was, that these defendants had conspired to defraud the United States, and the fraud was described to be the manipulation of the scales used in the weighing of dutiable coal, "to the end that said scales should record the weights of said coal desired by the defendants, and not the true weights of the coal placed thereon" (transcript, p. 7); "for

the purpose that the defendants, acting under the name and guise of said Western Fuel Company aforesaid, should receive the profit and gain to be made by such incorrect and fraudulent weights'' (p. 8).

The mention of the Western Fuel Company leads us to say that the company was in the business of importing coal into San Francisco, selling it to the retail trade there, and selling it, as well, to steam vessels plying between San Francisco and other ports, like the steamships of the Pacific Mail Steamship Company. The Pacific Mail was an American company, and, as such, and doubtless as a policy in encouragement of American marine, was entitled to get back—"draw-back" is the word used in the statute—from the government the amount in money of the duties which were paid to the government on the imported coal, bought by the steamship company and burned in its American ships. This draw-back would be figured on the weight of the coal bought and burned; and the fraudulent manipulation of the scales is made by this indictment to include, not only the scales on which the coal imported by the Western Fuel Company was weighed in the first instance, as it was unloaded from the ship that brought it to San Francisco, but as well the scales, on which so much of that coal as the Pacific Mail bought and burned, is alleged to have been weighed when delivered from the barges of the Western Fuel Company into the holds of the Pacific Mail liners.

Of these eight defendants, five were directors of the Western Fuel Company, namely: John L. Howard, the president; James B. Smith, the vice president; J. L. Schmitt, the treasurer; Robert Bruce, and Sidney V. Smith. The other three defendants, F. C. Mills, E. H. Mayer, and Edward J. Smith were employes. John L. Howard died during the trial, while the government was putting in its case. When the government rested, a motion to dismiss the case and for the entry of a verdict of not guilty, with respect to the defendants J. L. Schmitt, Robert Bruce and Sidney V. Smith—indeed, as to all the defendants—was made to the court on the ground that there was no evidence to support the charge of the indictment. This motion was granted as to the defendants J. L. Schmitt, Robert Bruce, Sidney V. Smith; it was denied as to the other defendants—John L. Howard having now passed by death from the scene—and as to them the trial proceeded to a verdict.

Edward J. Smith, one of the employes, was acquitted. James B. Smith, the remaining director and vice president, was convicted, also the two employes F. C. Mills and E. H. Mayer. They bring the case here in error.

I.

As a Matter of Law, the Judgment Should be Reversed, and This Upon the Clear Ground That There Was no Evidence, Sufficient in Law, or at All, to Connect the Defendants James B. Smith, F. C. Mills and E. H. Mayer, All or Any of Them, With the Conspiracy to Defraud Which This Indictment Proceeds Upon.

RULE AS TO INSUFFICIENCY OF EVIDENCE.

In *Union Pacific Coal Company against United States*, Circuit Court of Appeals, 8th Circuit, before Sanborn and Van Devanter, Circuit Judges, and William H. Munger, District Judge, 173 Fed. 738, 740, it is said in the opinion of the court, delivered by Sanborn, Circuit Judge:

“There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.” (Citing many cases, federal and state.)

**PARTICULARITY OF ALLEGATION IN INDICTMENT
FOR CONSPIRACY.**

Section 5440 of the Revised Statutes, preserved in Section 37 of the Criminal Code, reads:

“If two or more persons conspire either to commit any offense against the United States, *or to defraud the United States in any manner or for any purpose*, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the Court.”

The language of this statute is generic—extremely so; it makes no statement of the species of fraud, it does not descend to particulars. “In any manner or for any purpose”—to defraud the United States in any manner or for any purpose,—this is the language. Manifestly, an indictment going upon such general and bald expressions, charging a defendant with conspiracy to defraud the United States in any manner, without further specification, or for any purpose, without further description, would not be clear to the accused; it would not be certain at all, it would not apprise him of the crime with which he stands charged. It would be required of the pleader, in writing the indictment, to give such a description of the offense as to identify it, and thus make it possible for the defendant to prepare his defense, and avail himself of the judgment, when it came, as a bar to further prosecution; and this duty would be upon the pleader, again, in aid of the court, to advise it of the facts relied upon, to the end that it may determine their sufficiency in law to support a judgment.

The Supreme Court of the United States, in *United States against Cruikshank*, 92 U. S. 542, 557-8, said:

“In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right ‘to be informed of the nature and cause of the accusation’. Amend. VI. In *United States v. Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offence ‘with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged’; and in *United States v. Cook*, 17 Wall. 174, that ‘every ingredient of which the offence is composed must be accurately and clearly alleged’. It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, ‘includes generic terms, it is not sufficient that the indictment shall charge the offence *in the same generic terms* as in the definition; but it must *state the species—it must descend to particulars*. 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first to furnish the accused with *such a description of the charge* against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court *of the facts alleged*, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, *facts are to be stated*, not conclusions of law alone. A crime is made up of *acts and intent*; and these must be set forth in the indictment, *with reasonable particularity of time, place and circumstances*”.

These are fundamental things, and their bearing and gravity must be taken into the mind, if the law is to be administered, and the rights of these de-

fendants are to be protected, in the case now at bar. The Supreme Court of the United States, again, in *United States against Hess*, 124 U. S. 486, was considering a statute

“directed against ‘devising or intending to devise any scheme or artifice to defraud’, to be effected by communication through the post office. As a foundation for the charge”, the court went on, “a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, *with all such particulars as are essential to constitute the scheme or artifice*, and to acquaint him with what he must meet on the trial”.

The court said further:

“The statute upon which the indictment was founded only describes the general nature of the offence prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offence, states no matter upon which issue could be formed for the submission to a jury.

“The averment here”, says the court, “is that the defendant ‘having devised a scheme to defraud divers other persons to the jurors unknown’, intended to effect the same by inciting such other persons to communicate with him through the post office, and received a letter on the subject. Assuming that this averment of ‘having devised’ the scheme, may be taken as sufficiently direct and positive, the absence of *all particulars of the alleged scheme* renders the count as defective as would be an indictment for larceny without stating the property stolen, or its owner, or party from whose possession it was taken.”

The court goes to the point that a pleading in the language of the statute would be sufficient:

“The doctrine invoked by the solicitor general, that it is sufficient, in an indictment upon a statute, to set forth the offence in the words of the statute, does not meet the difficulty here. Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with *such a statement of the facts and circumstances* as will inform the accused of the *specific offence*, coming under the *general description* with which he is charged.”

The language from the *Cruikshank* case, which we have given above, is now quoted, and the court says, in conclusion:

“Following this rule, it must be held that the second count of the indictment before us, does not *sufficiently describe* an offence within the statute. The essential requirement, indeed, *all the particulars* constituting the offence of *devising a scheme to defraud*, are wanting. *Such particulars are matters of substance and not of form*, and their omission is not aided or cured by the verdict.”

The general term or notion, a conspiracy to defraud, has no existence outside the mind—in itself, it is only a mental abstraction; it acquires objective validity and a real, concrete identity, only when it is clothed with the particularity of some specific conspiracy to defraud, of this, that, or the other kind, susceptible of a description that will identify it. “Of course” as the court said in *United States v. Grunberg*, 131 Fed. 138,

“there are various ways of defrauding the customs. Parties may conspire to defraud by smuggling in goods at night; they may conspire to defraud by bribing the custom house

officers; they may conspire to defraud by forging invoices; they may conspire to defraud by false invoices; and a pleader must ordinarily show, in a general way, which of those methods the parties intended. The indictment must go at least so far as to point out something as to the way in which the parties intended to defraud, because there cannot be a conspiracy known to the Grand Jury, without some knowledge of the general line in which it was to march.”

Or, as the court puts it in the *Greene* case, 52 Fed. 104, 112:

“Whether the accused is charged with an offence is to be determined *by the particular acts or facts set forth*, and not by the conclusions of the pleader, although asserted in the words of the statute: ‘Every offence consists of *certain acts done or omitted under certain circumstances*, and in the indictment for the offence it is not sufficient to charge the accused *generally* with having committed the offence, but *all the circumstances* constituting the offence must be *specially set forth*.’” (Citing *United States against Cruikshank*, 92 U. S. 542, 563.)

In *Keck against U. S.*, 172 U. S. 434, 437, the indictment alleged that Keck, on a date named, “did knowingly, wilfully, and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to-wit: into the Port of Philadelphia” diamonds of a stated value, “contrary to law and the provisions of the Act of Congress in such cases made and provided, with intent to defraud the United States.” The Supreme Court said:

“As is apparent, the alleged offence averred in this count was charged substantially in the words of the statute. In the argument at bar counsel for the United States conceded the vagueness of the accusation thus made; and, tested by the principles laid down in *United States v. Carll*, 105 U. S. 611, 612; *United States v. Hess*, 124 U. S. 483; and *Evans v. United States*, 153 U. S. 584, 587, the count was clearly insufficient. The allegations of the count were obviously *too general*, and did not sufficiently inform the defendant of *the nature of the accusation* against him. The words ‘contrary to law,’ contained in the statute, clearly relate to legal provisions not found in section 2082 itself, but we look in vain in the count for any indication of *what was relied on* as violative of the statutory regulations concerning the importation of merchandise. *The generic expression*, ‘import and bring into the United States,’ did not convey the necessary information, because importing merchandise is not *per se* contrary to law, and could only become so when done in violation of *specific* statutory requirements. As said in the *Hess* case, at p. 486: ‘The statute upon which the indictment is founded only describes the *general nature* of the offence prohibited, and the indictment, in repeating its language without averments disclosing *the particulars of the alleged offence*, states no matters upon which issue could be formed for submission to a jury.’ ”

In the light of these principles, we may turn to the indictment with intelligent curiosity, to see there just what the specific conspiracy to defraud is said to be, how described and identified, which these defendants are alleged to have conceived and contracted for—what the “criminal partnership”

(*United States against Kissel*, 218 U. S. 608) is, which they are said to have launched.

THE SPECIFIC CONSPIRACY DESCRIBED IN THIS INDICTMENT.

The Western Fuel Company imports coal overseas from Nanaimo, in British Columbia, from Australia, and from Japan, in ships that tie up and unload at the docks of San Francisco Harbor. Up to and including August 5, 1909, the tariff on this coal was sixty-seven cents per ton (Par. 415, Sec. 1, Tariff Act of 1897). From and including August 6, 1909, and until coal was put on the free list, the duty was lowered to forty-five cents per ton (Par. 428, Sec. 1, Tariff Act of 1909). The number of tons of coal on which the duty is figured, was ascertained, of course, by weighing the coal as it was hoisted out of the ships and on to the docks, and this weighing was done on Fairbanks scales, and by the government weighers who had charge of the operation. We are dealing now with the coal as it came to the Western Fuel Company in the first instance—not with that coal, or any part of it, as it may have been delivered subsequently by the company to a customer, to some retailer in the city, or to some steamship in the stream. Now, it is in the weighing of this coal as originally received, in the fraudulent manipulation of the scales which registered its weight—the weight on which duty was calculated—that the indictment makes its first imputation of fraud.

But there is a second process, the delivery by the company to some customer of imported coal, after that coal has passed the custom house weighing and paid its duty. Where such customer was an American steamship, of American register, plying between San Francisco and some foreign port—a Pacific Mail liner, for example, running between San Francisco and Yokohama—the statute provided, in the nature of a subsidy to our American marine, that the steamship company should be entitled to a refund from the government of the amount of duty which had been paid on that coal at the time of its importation and entry. This second process, the delivery of coal to a customer like this, was a matter between the Western Fuel Company's coal barge—an open, floating warehouse—on the one hand, and a Mail liner like the *China* or the *Mongolia*, on the other. The barge in which, as in a bunker or a yard, imported coal had been stored, was towed through the waters of the bay to the side of the steamship. The coal was then hoisted from the hold of the barge, and dropped into a chute, along which it passed down into the receiving compartment of the vessel, there to be stored until it went into the furnace of the engine-room. The Mail Company was entitled to a draw-back of the amount of duty, on every ton of that coal, and the question was, how many tons were there in a given case? That was ascertained, to an extent, by weighing; and the weighing, again, was done on scales placed on the barge, and by the customs weighers of the gov-

ernment. It is in the weighing of this coal, in the second and subsequent process of delivery to the steamship, in the fraudulent manipulation of the scales which registered its weight—the weight on which the draw-back was calculated—that the indictment makes its next imputation of fraud. Some coal delivered to transport vessels of the government is put by the indictment in the same category with the Pacific Mail coal.

The Japanese line between San Francisco and the Orient, known as the Toyo Kisen Kaisha, as being a foreign line, was not within the draw-back privilege. But in the enumeration of overt acts, in alleged furtherance of the conspiracy, it is said in the indictment (pp. 13-14) that a money payment was made to the engineer of one of the Japanese ships, “in order,” as is rather blindly alleged, “to cause, procure, and induce the engineer aforesaid, to refrain from disclosing to the officers of the United States, the existence and operation by said defendant of the said conspiracy, and thereby to enable said defendant to continue to consummate and effect the object of the said conspiracy.” This insinuation need not detain us, and for two sufficient reasons: first, because the lower court ruled out any testimony of the kind as being inadmissible; and secondly, because an alleged overt act is no part of the conspiracy, and is required by the statute merely as affording a *locus penitentiae* (*United States against Britton*, 108 U. S. 199, 204; *Hyde against Shine*, 199 U. S. 62, 76). We come back, then, to the two

outstanding things which give character to this indictment—to the fraudulent manipulation of the scales, in the first instance, on the docks where the imported coal is unloaded; and in the second place, to the fraudulent manipulation of the scales on the barges, when the coal is transferred from those barges into the hold of a “draw-back” steamship. This is the time, now, for a close inspection of the indictment.

The indictment is printed at pages 5-15 of the transcript. It begins, at page 5, by charging the defendants with conspiring to defraud the United States—not, however, generally, or “in any manner,” but “in the manner following, that is to say.”

Next, at page 6, comes the allegation that the Western Fuel Company was a corporation engaged in the importation and sale of coal, and also in purchasing coal from other importers.

Now comes the descriptive matter, carrying out the promise of the expression, “in the manner following,” and giving identity to the conspiracy. This descriptive matter is found at pages 6-8 of the indictment, and it may be said of it, as was said of another indictment (*In re Benson*, 131 Fed. 969)—“obscure, involved, tautological and verbose; a single sentence runs stumbling over several printed pages without a period.” But with a little patience, the actual facts may be extracted.

We are told, that the defendants, under the name of the Western Fuel Company, conspired to defraud

the United States out of duties on import coal "by making and causing to be made *false weights* and *false and fraudulent returns of weights* of such cargoes and importations of coal." This goes to the coal received by the company in the first instance—to the fraudulent weighing of the coal at the docks, as it was unloaded from the ships.

Then follows the second process, namely, the delivery of coal from the barges to the "draw-back" steamships and the transports. "And *by further fraudulently weighing and causing to be weighed,*" the indictment goes on, "by themselves and by the Pacific Mail Steamship Company, and reported to the United States, the *weights* of all such importations of coal loaded from the bunkers and barges of said Western Fuel Company," on board the "draw-back" steamships, "and further to defraud the United States by making and causing to be made *false returns, weights and entries* of coal shipped and loaded aboard" the government transports.

"*And to that end,*" the indictment continues, "*and for the purpose of carrying out such conspiracy, combination and agreement,* to maintain on the *docks, wharves and barges*" of the company, "*scales and weights* which were to be and were *fraudulently manipulated* by the defendants to the end that said scales should record the *weights* of said coal *desired* by the defendants, and *not the true weights* of the coal *placed thereon*, and the said defendants did so *manipulate said scales and weights*, and the method of *weighing thereon*, so that

said scales and weights did record the *weights* of coal *desired* by said defendants, and *not the true weight* of the coal so *placed thereon*."

The fraudulent manipulation of the scales and weights, "so that said scales and weights did record the weights of coal desired by said defendants, and not the true weight of the coal so placed thereon," was supplemented, according to the indictment, by the fraudulent affidavits and statements of the defendants to the officers of the government and to the Pacific Mail Company, to the end "that said Pacific Mail Steamship Company should claim from the United States a greater 'draw-back' of coal duties, permitted where coal is loaded upon American registered vessels engaged in foreign trade, than *the true weight* of said coal would permit said Pacific Mail Steamship Company to claim, or was due the said Pacific Mail Steamship Company." The gravamen, then, of the indictment is, that the defendants conspired to manipulate fraudulently the scales, as well in the weighing of the coal upon the docks at the time of its importation, as in the weighing of the coal upon the barges, at the time of its delivery to the "draw-back" steamships, and thereby to defraud the United States of the duties which were payable on the true weight of the coal "so placed thereon," and of the amounts of draw-back attributable to the manipulated weights, registered by the barge scales, of the coal "so placed thereon". We find this summed up and addressed comprehensively to all the weighed coal, in the last para-

graph of the charging part of the indictment: “And further to cause *all coal weighed in, on or about the scales upon which the coal handled by said Western Fuel Company was weighed*, to be incorrectly measured and weighed, to the end, and for the purpose, that the defendants, acting under the name and guise of said Western Fuel Company aforesaid, should receive the profit and gain to be made *by such incorrect and fraudulent weight.*”

The pleader who drew this indictment seems to have assimilated, in his own mind, the case here to the case of *Heike against United States*, 192 Fed. 83, 91. The conspiracy alleged in the *Heike* case was to defraud the United States of import duties on sugar at the Port of New York. As in the case of coal at San Francisco, so with the imported sugar at New York, the invoice or bill of lading expressed the weights of the cargo as determined in the place of export. The duties were provisionally computed on the invoice weights, and the amount paid to the government. The goods were then weighed at the place of import by government weighers, and the duties were calculated upon their return of weights. If the importer, in paying on the invoice weights, had gone beyond the amount calculated on the return made by the government weighers, he was refunded the excess by the government. If the government weights, or “out-turn” weights, as they are called, exceeded the invoice weights, the importer made good the difference to the custom house. In the sugar case, the government was defrauded by a sys-

tematic tampering with the scales, which were made to register a weight less than the true weights; upon this lesser weight, the duties were finally liquidated, and the government paid over to the sugar company the difference between the amount of these final duties and the amount which had been figured on the invoice weights. The conspiracy turned on the tampering with the scales—that was the thing which gave it character and identity. The Circuit Court of Appeals said:

“Upon arrival of sugars, money was deposited with the collector sufficient to cover duties at the invoice weights. The sugars were then weighed by government weighers, and duties finally liquidated upon their return of weights. Certain of the conspirators were present at these weighings, *tampered with the scales*, and thereby made the apparent reading of weights registered on the dial or scale less than the true weights, in consequence of which the government weighers’ written statement as to the weights was a fraudulently made false statement. Being accepted by the collector as true, return of excess duties over amounts deposited was made to the company which imported the sugar.”

Here we have the fraudulent manipulation of the scales, the false return and entry, and the fraudulent withholding of duties from the government.

Again, it was said by the court (192 Fed. p. 100):

“It was overwhelmingly proved—we do not understand that it is disputed here—that for a long period of time the government was *defrauded* of duties by a *systematic under-weighing* brought about by the concurrent acts of em-

ployes of the sugar company *tampering with the scales.*”

When the case went to the Supreme Court of the United States (*Heike against United States*, 227 U. S. 131, 143) the court said:

“The frauds on the revenue were accomplished by a secret introduction of springs into some of the scales in such a way as to diminish the apparent weight of some sugar imported from abroad.”

In the *Heike* case, unlike the case at bar, there were two weighings of the same sugar, with a discrepancy uniformly against the government, except during certain periods

“when some controversy was pending which might involve investigations; and after the president of the company had written a cautionary letter, this discrepancy ceased, and when the rebate controversy was over, the old condition returned” (192 Fed. p. 97).

These two weighings are explained by the court (192 Fed. pp. 95-6):

“Besides the weighing of the sugar by the government officers for duty purposes, there was in the case of what are called ‘landed cargoes,’ a further weighing at the same time and place, on the docks, of the same sugar by certain city weighers in conjunction with sugar company checkers. The city weighers represented the persons who had sold the sugar to the company, and the weights ascertained and recorded on this second weighing were those on the basis of which the company paid for the sugar it had bought. The purpose of introducing this second record of weights was to

show discrepancies between the two weighings, uniformly against the government, except during certain periods. Such discrepancy was corroborative of other direct evidence going to show that, *by tampering with the scales*, government weighers had been tricked into returning short weights."

And finally (192 Fed. p. 101),

"the government showed that there came before these defendants monthly statements, which contained disclosures as to intake and output of the refinery, which, it was contended, indicated that the government weights were *uniformly abnormally short*, except during the brief period when disputes as to rebates produced a temporary cessation of *the tampering with the scales*. As to Heike, it was shown that he took action *to effect a change in the methods of bookkeeping* by making *additions to the intake figures* after they reached headquarters, which, it was contended, was *consistent only with knowledge* that the government weights were being *abnormally reduced*, and *with intent to cover up the transaction*. *Statements made and action taken* by Gebracht were testified to, which, it was contended, were consistent *only with guilty knowledge and participation*. Letters written *by both defendants* were put in evidence."

The court concluded that

"there was sufficient in the record to warrant a finding of knowledge and participation on the part of each."

**NO SUBSTANTIAL EVIDENCE, NO EVIDENCE AT ALL, OF THE
CONSPIRACY CHARGED IN THIS INDICTMENT.**

We are brought face to face, then, with the question in this case: Under this indictment was there

“substantial evidence of facts which exclude every other hypothesis but that of guilt,” (*Union Pacific Coal Company against United States*, 173 Fed. 737, 740) to the point and accusation that these defendants conspired to defraud the United States of import duties, whether in the weighing of imported coal on the docks, or of “draw-back” coal on the barges, by a fraudulent manipulation of the scales and weights, “so that,” in the words of the indictment, “*said scales and weights* did record the weights of coal desired by said defendants, and not the true weight of the coal *so placed thereon?*” And if, as said in the *Union Pacific Coal* case, *supra*, “all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction”.

A fact that stands out in the case, something to be understood at the threshold, is the matter of an overage, or, as it is sometimes called, an overrun. Coal is a more or less porous substance, it absorbs moisture, and takes on weight accordingly. A pile of coal, of a given weight as it comes from the ship, when exposed to the atmosphere, whether in an open bunker or yard, or on an open barge, if played upon by water, whether from the atmosphere in the form of rain, or from a hose, gains in weight, acquires weight “over” and in excess of the first weight, overruns it; there is, in point of weight, as related to the first weighing, an overage or overrun, as the coal men call it. This is inherent in the nature of the coal, it is inherent in the coal business, in the

methods and places of storage and distribution, every coal man knows it, every coal man has had experience of it.

TOTAL OVERRUN, BUNKERS, BARGES AND YARD, ONLY 2.8%.

The average stock in trade of the Western Fuel Company, coal on hand, kept in storage, was about 32,085 tons, of which 2000 tons in San Francisco, 3000 tons in Oakland, were under cover, leaving, first and last, some 27,000 tons uncovered, exposed to atmospheric moisture, to rainwater, and to water from other sources (p. 1619). Coal, to illustrate, arriving here during the dry season, and piled in the open awaiting consumption through the winter months, would be exposed to climatic moisture and rain before going out of storage (pp. 1068-69). Piled coal tends to become heated, with danger, as well upon land as in the body of the ship, of firing up in spontaneous combustion, and it became necessary, on occasion, in the case of coal in storage, to flood it with water by means of pipes introduced into the mass (pp. 2158-9). A pile of coal once rained upon, flooded, or otherwise saturated with moisture, dries out only on the surface (pp. 1607, 2198). Coal, when hoisted from barges, dropped from the buckets and sent down a chute into the hold of the steamship, makes more or less dust, and it was a common thing for the crew of the steamship to wet it down; this was a common thing also in aid of the coal trimmers, the men who leveled it off in the ship's hold, and who had to breathe that they might do

the work (p. 2110). A fire hose would be played on the coal in the barges three or four times a day, from 20 to 30 minutes at a time, and again, for three or four hours at a time (pp. 881, 1331).

One witness speaks of the water dripping from the tubs as they came out of the hold of the barge (p. 1520). One of the steamship engineers complained that as much as a hundred tons of water went into his ship with the coal (p. 444).

This increase in weight, this "overage," of coal stored in the open, was testified to by scientific witnesses of eminent qualification and experience in the subject matter, like Professor Parr, Professor Somermeier, President Branner of Stanford University, and Professor Folsom of the same University. Parr has been Professor of Applied Chemistry for some 23 years in the University of Illinois, he made a special study of coal, and issued twelve publications on the subject, and he has been engaged in the public service of Illinois, in supervision of the coal purchased by the state. He has invented a number of devices for use by engineers in trying out the character and properties of coal, he has acted as umpire on a number of occasions in the settlement of disputes between operators and the users of coal, and he has been in charge of the examination of hundreds of coal mines (p. 1570).

Somermeier is Professor of Metallurgy in the University of Ohio, and has been associated with Professor N. W. Lord in his work as Chemical Director of the Coal Laboratory of the United States

Geological Survey. He also did the coal work for the Ohio Geological Survey from 1900 to 1907, and published the results of that work, the publication appearing under his name and that of Professor Lord. Ohio coal is the most important mining industry of the state, reaching an annual production of over twenty million tons. Somermeier, from May, 1904, to September, 1905, was in direct charge of the United States Government Laboratory at St. Louis.

“I have,” he said, “in my study of coals been particularly concerned as a specialty with the determination of moisture, oxidation and heating value” (pp. 1774, 1775).

These two witnesses went to the mines of the Western Fuel Company at Nanaimo, and made observations and experiments on the ground.

The overage in the weight of coal, as affected by the atmosphere and moisture, is made very plain by the testimony of these scientific witnesses, and no attempt was made to contradict the testimony. Coal, such as we are concerned with here, as it comes from the mine, and owing to the geologic pressure to which it has been subjected in place, has a relatively low percentage of moisture, which is constant for a particular mine (pp. 1783, 1778, 1790, 1597). The Western Fuel Company handled British Columbia coal, Australian coal, and Japanese coal, in the proportions, respectively, of 70%, 25%, and 5% (p. 1619). These coals are all low moisture coals, with a moisture content, in the first instance,

of about 3% (pp. 1602, 1784). They will gain in weight, on exposure, from one to eight per cent (pp. 1786, 1606). Indeed, as President Branner says, "the general rule is a matter of common information" (p. 1814). This overage is greater in fine coal than in lump coal. "Lump coal, without any fines in it, would perhaps have its upper limit of moisture content at two or three per cent; the finer the coal, the more moisture it would hold up to eight or ten per cent, in the general type of coal that is handled here" (p. 1607, p. 1881). Japanese coals have a large proportion of screenings, and the percentage there would run as high as twelve or fifteen per cent (p. 1607, (p. 1750, p. 1787, p. 1617). Australian coal has 24% of screenings or fine coal (p. 1787). British Columbia coal has 35% of screenings (pp. 1945, 1942).

Indeed, it was laboring the point to examine scientific witnesses at all, as to the overage. As President Branner remarked, in language already quoted, the general rule is matter of common information. Perhaps Dr. Branner might have qualified this statement by saying that the general rule was a matter of common information to people in the coal business, to those who knew anything about it. Take a man, like Henry Rosenfeld, one of the best known coal men in San Francisco, of long experience and familiarity in the handling of the coal in question (pp. 1941-2, 1943). His firm, the well known house of John Rosenfeld Sons (p. 1944) had been succeeded by the Western Fuel

Company (p. 1943). The defendants Mills and Mayer had been in his employ, respectively as superintendent and weigher, and in those same capacities they went over to the Western Fuel Company.

“Most coals,” says Mr. Rosenfeld, “would overrun, but some of them did not. For instance, Eastern anthracite is always short, and some kinds of English and Scotch coals would sometimes be short. *The Nanaimo, Japanese, and Australian coals would always turn out over. I would estimate this overage as between two and three per cent.*”

And again:

“I attribute *the usual increase* in the weight of a pile of coal thus left in the yards, to rain fall and the humidity of the atmosphere, and to fog. The amount of the increase varies entirely according to the brand of coal, its percentage of screenings, length of exposure, etc. Some coals turn out short, *but not Nanaimo.*”

To a suggestion that coal moved more or less frequently in the operations of the business, would be less subject to humidity, Mr. Rosenfeld, on cross-examination, gave this instructive testimony:

“We always attempted to handle first the coal that was *in the bunkers*, the coal in the yard *being piled there for the winter when the demand was more*. We left the coal in the yard *by force of circumstances* because there was not so much sale in the summer. The coal that was handled all the time, sold to the ships, and to the trade, *came from the bunkers, largely*. It was kept moving all the time. *It is not a fact* that by reason of that constant movement we had *a shortage* in that coal, ex-

cept in an exceptional situation and with some Eastern and English brands. The coal that is thus in constant movement from ships to bunkers, and from bunkers to barges, etc., does not suffer very much by reason of humidity, and it is not as likely to increase in weight as the coal in storage in the yards up into the winter. I think, however, that even the coal that is thus handled continuously *is likely to undergo some increase in weight*, but I could not say what the percentage of that increase would be. I should judge *somewhere between 1 and 2 per cent*. Except that the coal *did overrun*, I have no recollection about the matter. I would say that the increase was sometimes *over 1½ per cent*, but I could not tell you how many times that occurred. We have had an increase of *2 per cent and more* even in the case of coals *that never entered the yard*. *That would not be an extraordinary percentage of overage if the coal had laid in the bunker for any length of time*. In the summer probably the coal would not turn out more than 2 per cent over" (pp. 1952-3).

H. C. Richards, a coal man of long experience in San Francisco, and familiar "with all kinds of coal coming in here" (p. 1955), including the coals in question here, testified that, "in the great bulk of cases, there was an overage" in coal stored "under usual conditions, that is, put in a yard, subjected to water falling on it, and then taken away in the ordinary course of business" (p. 1956); very little of the weight would be lost by evaporation during dry weather, and climatic conditions in San Francisco, like fog, would have to be reckoned with (p. 1959).

Robert Husband has been in the coal business in San Francisco for thirty years, including in his experience the British Columbia, Australian, and Japanese coal, carrying coal in stock for sale in quantities varying from ten thousand to thirty thousand tons, this coal being kept in stock, on an average, for six months before being disposed of.

“Our experience was, that we would have *two or three per cent* more coal on hand when stock was taken, than our books showed us to have received, basing the amount received on the custom-house weights” (pp. 1962-3).

He adds:

“We always figured a profit *on our overrun* of fifteen cents a ton, and I always used that in making my calculations, *in bidding for contracts*, and so on” (p. 1963).

Mr. Husband further says that

“during the winter months, the increase would be larger than the percentage I have given—I have known it to run as high as a five per cent. increase in the winter season, the amount of the increase depending both on the character of the coal and the character of the weather” (p. 1965).

And again:

“The only causes I know of for the increase in the weight of these piles of coal stored in the yard, would be the accession of rain and the fog, and the absorption of moisture. If the pile of coal were put in the yard in summer months, and remained about two or three months before the rain commenced, the increase

in weight would not be so great, of course, as it would be in the winter when the rains were falling. It was the practice among wholesalers or importers in my time, to store up coal exposed to the elements. They were drawing from their own mines" (pp. 1965-6).

James J. McNamara, in the coal business here for over 31 years, and, since 1895, manager of the Central Coal Company, which is virtually owned by the Western Fuel Company, was, of course, familiar with the coals imported by the Western Fuel Company.

"I have carried coal," he says, "in stock here in San Francisco, it would be exposed to the weather in quantities of several thousand tons at a time. We have generally experienced an overrun in that connection amounting to three or four per cent over the custom-house weight" (pp. 1968-9).

This witness indicates, in explanation of the increase in weight, something elsewhere testified to in respect to the Western Fuel Company, and nowhere questioned (p. 2157), namely, that his company weighed out the coal to customers on an even beam, selling it according to circumstances by the short ton or long ton measurement (p. 1969), whereas the custom-house weights were not accurate; and it is beyond question in this case that the custom-house weights were on a rising beam (pp. 251, 290, 300). The witness, before becoming manager of the Central Coal Company had been

"with the firm of J. McDonough & Co., and that was also where I had my experience in

connection with the overruns of coal in stock. I was with them for four years" (p. 1973).

R. P. Jansen had been for thirty years weigher for the Pacific Coast Coal Company. It was the practice of that company, when coal was wet, to make an allowance to purchasers on account of moisture (p. 1974). Mr. Jansen says:

"To my knowledge, there were overruns in the stocks of coal yarded by the Pacific Coast Coal Company. The percentage of that overrun on the custom-house weights would be from two to three per cent. That overrun occurred in spite of any allowance which we were accustomed to give to purchasers for coal that was wet. The range of the allowance would be about four to five per cent."

And on cross-examination he says:

"The coal of the Pacific Coast Coal Company was stored at the foot of Beale street. A record was kept of the amount of coal that went into a pile, and of the amount that was taken from the pile at clean-up. Assuming that in dry weather a pile was created and removed without any intervening rain-fall, I would not think that that pile would decrease in weight. I should think, from my judgment and experience, that it would increase; in sixty or ninety days I should think that such a pile might increase about 2%, or about half as much as it would increase during a rain-fall. I think that is to be accounted for in dry weather by fogs and moisture. I would cite coal coming in by rail from Utah as an instance where a pile increased 2% in dry weather in thirty days. Sometimes coal increasing 2% in dry weather, would remain in the yard stored three or four months" (pp. 1974-5).

Mr. James B. Smith, vice president of the Western Fuel Company, and in the coal business 32 years, testified:

“As long as I have had any knowledge of that business, overruns have been found to occur in its conduct. The time when one has opportunity to find out about overruns is naturally at the taking of stock for the ascertainment of conditions as to the delivery and receipt of coal, and as to the coal on hand. In taking stock for any period, the elements and factors to be considered would be the amount of coal on hand at the beginning of the period, the quantity of coal as shown by the receipts during that period, the quantity of coal shown by the deliveries during the same period, and the quantity of coal actually on hand at the conclusion thereof. *These times of taking stock are the only times when I would have occasion to note such overruns as there might be.* We adjust our stocks at least once a year. It sometimes occurs that we do so more often, but I would regard one adjustment per year as essential. According to our adjustments, the overrun or excess would be from $2\frac{1}{2}$ to 3%. To the best of my recollection, that has been our normal overrun in the Western Fuel Company since its incorporation. In answer to the question whether that overrun was regarded by me as in the nature of a surprise, I would say that considering the character of the commodity and the conditions under which we receive and sell coal I considered the fact that we had such a small percentage of overrun a normal result in the general transaction and character of our business. If my memory serves me right, the percentage of overrun that the Western Fuel Company had was not any larger than that which I experienced in the previous coal concerns with which I was connected” (pp. 2156-7).

Mr. Smith then explains the weighing of imported coal, under the Treasury Regulations with a rising beam:

“Under such a system there must be an increase in weight given to the recipient of the coal. When the Western Fuel Company sells and delivers coal to its customers it endeavors to give them the weight which they pay for, but we weigh the coal out on an even, rather than a rising beam” (p. 2157).

He estimates the difference in weight, as between the custom-house method of the rising beam and the company's method of the even beam, as ranging from one-half to three-quarters of one per cent (p. 2158). His experience as to absorption and retention by coal of moisture, covers some 26 or 27 years (p. 2158). On occasions where piled coal was heating, it has been necessary to saturate it thoroughly with water—Mr. Smith has known of coal piles to catch fire “before we could get the water on them” (p. 2159). He has seen the coal piles actually break into flame once or twice during his connections with the Western Fuel Company, and several times during his earlier experience in the coal business (p. 2159).

“As a general thing, though, we have flooded the pile before that would occur. The method of flooding is to put a hose through the different parts of the pile until it would be so thoroughly saturated that the water would drain out from the bottom” (p. 2159).

He speaks of natural causes accounting for the overage mentioned by him of from $2\frac{1}{2}\%$ to 3% :

“I have in mind the absorption of the commodity, and the atmospheric conditions to which coal is subjected here, both in the rainy and in the dry seasons” (p. 2158).

He says, further:

“I have said heretofore that we ascertained our overrun at the time of taking stock. The barge business is not segregated from the rest of the business in respect to this determination of overrun. No computation was ever made on the barge overrun, or the percentage of barge overrun, prior to the investigation conducted by Price, Waterhouse & Company, accountants, and submitted here in this trial, showing an average barge overrun of 4.8%. I would account for this barge overage of 4.8%, covering the period of 1904 to 1912, by the method of weighing, by the fact that some of the coal goes into the barges without being weighed, and by the moisture content of the coal. There is no question but that that coal will be increased in weight whether summer or winter if water be added to it. I mentioned the methods of weighing: I refer to the weighing out of coal from incoming vessels as well as the weighing out of coal from barges into the liners, this weighing being on the average system. By absorption of moisture, I refer both to the placing of water on the coal by artificial means and naturally from the atmosphere. The average system of weighing cannot be an exact or accurate system” (pp. 2159-2160).

It would be extraordinary, then, it would be incredible, if, during the years that the Western Fuel Company kept coal in open storage at San Francisco, there had not been an overrun or overage, in excess of the custom-house weights. There

was such an overrun; what happened to the other coal men in San Francisco, happened to the Western Fuel Company—there was an overrun, just such an overrun as these coal men speak of, and an overrun of less than 3%. The books of the Western Fuel Company, put in evidence by the government itself, for the period between April 1st, 1906, and December 31st, 1912, about seven years, showed the following:

The company sold during this period,	2,196,215 tons
Destroyed by fire in 1908,	326 “
On hand at end of this period,	4,286 “
	<hr/>
	2,200,827 tons
Company imported during this period, going now by the custom-house weights,	2,138,831 “
	<hr/>
Excess, “overage”, or “overrun”,	61,996 tons
(Government Exhibit No. 125, Table B, p. 2732; and Table A of same Exhibit, p. 2728.)	

That is to say, with an importation, according to the custom-house weights, of 2,138,831 tons during a period of seven years, we have an overrun of 61,966 tons, or only 2.8 per cent.

“And that overrun”, W. H. Tidwell, special agent of the government, was asked, “on the whole of the business done by the company, including sales in every direction, those as to which deliveries were made to the sides of vessels through the barges, those as to which deliveries were made by being loaded upon coal wagons in this city, and those as to which

deliveries were made by the railroad trains, is 2.8 per cent only in excess of the out-turn custom-house weights upon the importation of the coal; is not that the fact?"

To which Tidewell answers:

"That is approximately correct" (pp. 668-9).

So much, then, for the total overrun of coal in storage, as compared with the custom-house weights, whether stored in bunkers or barges or yards. The overrun, as such, inhered in the business—in the nature of the commodity handled, in the method of weighing the coal, under government regulation, on a rising beam, (pp. 251, 290, 300, 1490, 1491, 1627, 1992-3, 2157-8), for the ascertainment of the dutiable weights, as compared with the weighing of that coal by the company, on a level beam, for distribution into the trade (pp. 2157, 1969); in the exposure of the coal to atmospheric conditions of moisture, to rain and fog, in the subjection of the coal to the action of water through pipes in the yard, or to the playing of the ship's hose on the barge; in the observation, experiment, and judgment of informed and scientific men; in the every day experience of San Francisco coal men, of every witness who had direct touch and knowledge of the business. It was the normal, usual, familiar overrun, if anything slightly less, of coal in stock, as the coal business was ordinarily and regularly conducted in San Francisco. It was not a condition of government weights "abnormally short", of government weights "abnormally reduced", as in the

Heike case (192 Fed. 101). It was normal, it was not abnormal.

**DIFFERENCE OF APPROXIMATELY 1% BETWEEN INVOICE
WEIGHTS AND CUSTOM-HOUSE WEIGHTS.**

But during this same period, April 1, 1906, to December 31, 1912, for which we have been looking at the total overrun of all coal in stock in excess of the custom-house weights, there was a difference between the invoice weights of the imported coal and its ascertained weight,—ascertained by the custom-house weighers. This difference was less than 1% of the invoice weight, as appears from the exhibit prepared and introduced by the government itself, namely, U. S. Exhibit 125, Table A, p. 2728 of the transcript. The ascertained weight, it appears from this table, and as we have already seen, was 2,138,831 tons. The invoice weights, for the same period, are 2,159,551 tons. The difference is only 20,720 tons. The ascertained weights coincide with the invoice weights to the extent of 99% and more.

This approximate difference of but one per cent between the invoice weights and the custom-house weights, is susceptible of a slight shading, under and over. It is slightly less than 1% as appears from the figures just quoted from Table A of U. S. Exhibit 125. It is slightly over 1%—by 7/100 of 1%, on the figures of Table D in this same exhibit, page 2814 of the transcript.

A word of explanation here. Not all cargoes of imported coal, in the case of the Western Fuel

Company, were full cargoes. A ship might come into this port with three thousand tons of coal, consigned to the Pacific Coast Coal Company, for example; the Western Fuel Company might have need of a thousand tons of that coal, it would negotiate for it, buy it from the Pacific Coast Coal Company, and that ship, to the extent of the thousand tons, would be discharged at the Western Fuel Company's dock, and the custom-house weight of the thousand tons of coal would be there ascertained, just exactly as a full cargo would be ascertained—by the government weigher. The other 2000 tons would be taken by the ship over to the dock of the Pacific Coast Coal Company, for a second unloading, or, indeed, the first unloading might have been at that company's dock, and the second unloading at the dock of the Western Fuel Company. The 2000 tons would go through the same process for ascertainment of custom-house weight at the one dock as at the other. The custom-house would have its record of the two weighings, it would add them together, and it would compute on the total sum the amount of liquidated duties. The invoice or bill of lading showing the weight of this coal at the point of origin or export, would accompany the cargo, and would express the invoice weight of the cargo as an entirety. Indeed, the break-up of that cargo into partial distributions at San Francisco might not have been contemplated until the ship arrived here and lay in the stream. There would, therefore, be no fractional invoices—no in-

voice weight of the thousand tons taken by the Western Fuel Company, no invoice weight of the 2000 tons taken by the Pacific Coast Coal Company. Consequently, while the custom-house would have the ascertained weight of the Western Fuel Company's partial cargo, of the thousand tons, that is to say; nevertheless there would be no invoice weight of that particular thousand tons to compare with the custom-house weight of the same; and for the plain reason that no such invoice weight was to be had. This situation led to the preparation by Mr. Tidwell of Table D, attached to this same Exhibit 125, and found at page 2814. In Table D, Tidwell assumed that the partial cargoes taken over by the Western Fuel Company, upon which the custom-house weight had been ascertained, but for which there was no invoice weight, should have attributed to them an invoice weight, a supposititious one, precisely identical with the custom-house weight. These partial cargoes, as made to appear by Exhibit D, amounted to 232,990 tons. He subtracts this amount from the invoice weight, 2,159,551 tons of Table A, leaving a net invoice weight of imports of 1,926,561 tons.

If, now, the net shortage, 20,720 tons, be computed in terms of percentage on the basis of this net invoice weight, after the deduction has been made for partial cargoes, a slight change or shading of the percentage must be made—instead of being a trifle under one per cent, it is a trifle over—by seven one-hundredths of one per cent; and

this is the maximum, the extreme percentage, at which the government has been able to arrive. No doubt, if the invoice weight of a partial cargo could have been had, and could have been contrasted with the custom-house weight, the normal and usual shortage, in the neighborhood of one per cent, would have come out; but Tidwell's difficulty, as he testified, was, that while he had the invoice weight of the full cargo, and the custom-house weights of the partial cargoes, whether at the Western Fuel Company's dock for a thousand tons, or at the Pacific Coast Coal Company's dock for 2000 tons, yet he was not able to tell where the normal shortage on the total cargo lay—how much of it was attributable to the coal taken by the Western Fuel Company, how much attributable to coal taken by the Pacific Coast Coal Company. The result was, that in case of partial cargoes, he made no assignment, anywhere, of the usual and normal shortage. But the point is not to be missed—it stands out in the examination of Tidwell by the government counsel, that a shortage between invoice weights and custom-house weights is a datum, a known quantity, a normal and usual thing to be expected and reckoned with by anybody in the business. In explaining why he assumed the custom-house weight of a partial cargo to be the invoice weight, and so made up his Table D, both Tidwell and his counsel show full recognition of this normal

and usual shortage. Tidwell is asked the following question, and he answers it as quoted below:

“Q. And, of course, that had to be done by you because, in a case where there was a shortage, and two or more persons purchased parts of the cargo, it would be impossible for you to tell *where the shortage occurred*, and the exact amount of shortage that *ought to be charged up* against the Western Fuel Company, or that *ought to be charged up* against the other vendees; is not that correct?

“A. That is true” (p. 288).

Any assumption that these invoice weights were accurate and exact is purely gratuitous. Japanese coal, in respect to bunker coal, seems to have been averaged on the weight of every “tenth bag ashore” (p. 1861); and in respect to cargo coal, by estimate of the capacity of the lighters (p. 1860). As to the Australian coal imported by the company, the testimony does not inform us of the methods pursued, at the place of original shipment, for the weighing of the coal. If the same practice obtains in Australia as in British Columbia, then Australian coal, 25% in quantity of the company’s importation, was invoiced at the weight registered by a falling beam, in contradistinction from the rising beam of the San Francisco custom-house. British Columbia coal, as noted above, constituted 70% of the company’s importation. For the seven years between April 1, 1906, and July 12, 1913, the difference between the invoice weight and the ascertained or custom-house weight of this coal was relatively insubstantial and negligible—a percentage of .0112 of

the invoice weight. To give the figures, all British Columbia coal imported by the company during these seven years was invoiced at the weight of 1,295,199 tons; its custom-house weight was ascertained at 1,280,676 tons; or a difference in 1,295,199 tons, of 14,523 tons; or, again, as expressed in terms of percentage, .0112 of the invoice weight (p. 2072).

But the invoice weight of this British Columbia coal was demonstrably inexact. It was inexact for purposes of relation to the custom-house weight, for the plain reason that it was weighed, when weighed at all, in British Columbia, on a falling beam (pp. 1513, 1490, 1491) at San Francisco, the custom-house, acting under a government regulation to that effect, weighed it on a rising beam. In large part, however, it was not weighed at British Columbia at all, it was estimated there, and it was invoiced accordingly. The explanation may be made here that coal shipped by the Western Fuel Company from its own mines at Nanaimo to itself at San Francisco, was, in the administration of the business, invoiced to the company precisely as if the company at San Francisco had been some third person (p. 1477). Now, then, the company had two mines in British Columbia, one at Nanaimo, the other at Northfield. The Nanaimo coal was weighed before shipment; there were scales at Nanaimo, and upon these scales it was that the coal was weighed, and on a falling beam (pp. 1513, 1490, 1491). There were no scales at Northfield, the Northfield coal was not weighed at all, its weight was merely esti-

mated. Between the rising and the falling beam, a difference would result of 1.03 per cent, and as much as 1.16 per cent (pp. 1490, 1491, 1627). When the weight was merely estimated, it was by reference to the draught of the vessel, a process necessarily inexact and approximate only (pp. 1492-4). During the seven years in question there were 166 cargoes from British Columbia. Of these, but 16, speaking strictly, were from Nanaimo. The remaining 150 were mixed cargoes, partly from Nanaimo, where the weight was calculated on the falling beam, and partly from Northfield, where the coal was not weighed at all (pp. 1479-1485, 1486).

Indeed, regard being had to the approximated weights of coal loaded at the Northfield mine, Mr. Stockett, manager of the Nanaimo mines tells of the practice, begun in March, 1906, of making the bill of lading weight on large cargoes 100 tons, and on small cargoes 50 tons, less than the estimated weight. This difference was discontinued in November, 1907. And in September, 1908, the practice was introduced of making a deduction from the estimated or approximated weights of three per cent, to fix the bill of lading weights. This continued until June, 1909, when the deduction was cut down to one per cent (pp. 1474-5). The discontinuance of the hundred ton reduction on large cargoes and the fifty-ton reduction on small cargoes, was under instructions from the San Francisco office (letter from Mr. Norcross, secretary, of November 12, 1907). The reduction of the percentage basis

from 3% to 1%, was likewise under instructions from the San Francisco office, contained in Mr. Norcross's letter of July 9, 1909, directing a reduction from 3% to 1% "as there does not seem to be any necessity for such a heavy allowance"; and Mr. Norcross adds, in explanation:

"On the last six cargoes received, the actual weight was 36,347 tons, turned-out 35,882 tons, a shortage slightly over one per cent" (pp. 1477-8).

The term "actual weight" used by Mr. Norcross, refers, really, to the estimated weight; in large part estimated, as we have shown, because of conditions obtaining at the Northfield mine. It is proper to say that in some cases,—in 1906, two cargoes loaded exclusively at Nanaimo, where there were scales—a deduction appears to have been made for the invoice weight, due, probably, as explained by Mr. Stockett, to the circumstance that the office-men may have overlooked the fact that the vessel was loaded exclusively at the No. 1 mine (p. 1488). In point of fact, Mr. Stockett knew nothing of this until he was making up his statement for the case on trial, in the summer of 1913 (p. 1488).

It may be added here, what has been adverted to more than once, that the government duties on this Nanaimo coal, as on all imported coal, were computed and liquidated on the custom house weights at San Francisco; and it was upon these custom house weights that the San Francisco office, as in the case of any importer from whom the Western Fuel Com-

pany bought imported coal, made its accounting and settlement.

But this is not all. The Western Fuel Company, it is true, imported coal into San Francisco, not simply from its own mines in British Columbia, but from Australia and Japan as well. It was not the only Richmond in the field, however. There were other coal importers in San Francisco. It is of interest, at this point, to compare the net shortage, as between invoice and custom house weights, in the importations by the Western Fuel Company of this foreign coal, on the one hand, and, on the other hand, in the importations of these different coal importers doing business, like the Western Fuel Company, in San Francisco. It is all brought out in the transcript (pp. 2032-2047). We give the result, it speaks for itself:

Net Shortage on Australian coal discharged by the Western Fuel Company, April 1, 1906—July 31, 1913,	57/100 per cent;
Net Shortage on Australian coal, same period, dis- charged by Pacific Coast Company and Jas. P. Tay- lor,	70/100 “ “
Net Shortage on Australian coal, same period, dis- charged by J. J. Moore & Co.,	1 12/100 “ “

Net Shortage on Australian coal, same period, discharged by Pacific Fuel Co.,	59/100 per cent;
Net Shortage on Australian coal, March to September, 1907, discharged by Southern Pacific Co.,	8/100 “ “
Net Shortage on Australian coal, November, 1907—April, 1910, discharged by Hind, Rolph & Company,	3 4/100 “ “
Net Shortage on Japanese coal, February, 1907—May, 1913, discharged by Western Fuel Company,	2 63/100 “ “
Net Shortage on Japanese coal, March, 1907—January, 1910, discharged by Southern Pacific Company,	2 62/100 “ “

Henry Rosenfeld, who has been mentioned above, testified:

“As to the importing of coal, our experience with reference to Japanese and Australian coal was, that the custom-house weight at this port was less than the bill of lading or invoice weights. That is to say, there would be shortages. We were, at that time, importing coal from our own mines in British Columbia. I could not give an accurate estimate as to the amount of the shortage, because it varied greatly. Sometimes it would

be 1%, sometimes as much, I should think, as 4% short" (p. 1944). And again, speaking of the British Columbia coal: "The consular invoices or bills of lading were sent to our office in San Francisco. The cargo of coal was weighed in San Francisco by the custom-house weigher. As far as I recollect, the latter's records always, or rather usually, showed a shortage averaging from two to four per cent" (p. 1946).

Similarly, Mr. Husband says that

"usually the custom-house weight was short of the bill of lading weight on Nanaimo and Australian coal" (p. 1963).

The inexactness in the process of weighing coal, whether at the point of origin or at the point of discharge, is illustrated by the government Exhibit No. 125, in the summary of Table A, at page 2728 of the transcript. It appears therefrom that while the custom-house weights, during the period, 1906-1912, in the net result went short of the invoice weights, to the extent, as we have already noted, of 20,720 tons, nevertheless during this period, and for each year of it, there were overages in the custom house weight, as compared with the invoice weights, just as there were shortages in the custom-house weights as compared with the invoice weights. These overages—these instances in which the custom house weights went over, not under, the invoice weights, are tabulated in terms of tons, year by year, in this summary of Table A, and they amount, in the aggregate, to 5324 tons. On the other hand, the shortages in the custom house

weights, as compared with the invoice weights, are also tabulated, and in the aggregate they come to 26,044 tons. The net shortage is, therefore, 20,720 tons, a net expression, less than 1% of the invoice weights. Coal is not handled on the delicate poise of a chemist's balance. It is a rough commodity, shipped and weighed in bulk. So considered, and without adverting to the falling beam in one place and the rising beam in another, or to the Japanese average, or to the Northfield estimate, it would be out of all reason to expect a perfect equation between the weights at the place of shipment, and the weights at the port of entry. Hence it is, that we find the customs officers of the government, fully apprised as they were of the invoice weights upon which they figured and collected the duties provisionally, accepting and acting upon the custom house weights, slightly lower by about 1% in the net result, and, year in and year out, refunding the excess duty accordingly to the Western Fuel Company. The company, throughout the years, paid the government for duties, calculated in the first instance on the invoice weights, \$1,120,553.97. The government, in full knowledge of the premises, accepted the custom house weights, lower in the net result, as the basis on which the duties were to be finally liquidated, and on that basis refunded to the company, through these same years, excess duties to the amount of \$10,788.58. This left a net amount of duty paid to the government of \$1,109,765.39. The entire refund was less than 1% of the total duties

actually and finally paid (p. 2061). Other importers of coal at San Francisco from whom the Western Fuel Company had occasion to buy imported coal, acted just as the custom house acted. They took payment from the Western Fuel Company for their bill, on the custom house weight of the coal, although that meant a less amount of money than if the bill had been made up on the invoice weight. Everybody concerned did the business that way—the government, the Western Fuel Company, the other coal importers. The Western Fuel Company itself had, on occasion, sold cargoes of British Columbia coal, imported by it from its own mines, to the Spreckels Commercial Company at San Diego (pp. 528-9, 530-1-2-3). These cargoes were entered by the Spreckels Company at the Port of San Diego; they were weighed by the customs officers at San Diego, in connection with the entry, the Western Fuel Company had nothing to do either with the entry or with the weighing of this coal at San Diego. In the case of each of the cargoes, the custom house weight at San Diego was less than the invoice weight. The average shortage was $1\frac{92}{100}$ per cent (pp. 540, 541), as compared with the percentage of .0112 representing, as we have already pointed out, the shortage between the custom house weights and the invoice weight of all British Columbia coal imported by the Western Fuel Company for its own stock at San Francisco, between April 1, 1906, and July 12, 1913. The Western Fuel Company, like the government, like these

other coal importers, accepted, as a matter of course, the lower custom house weights of San Diego, as against its own invoice weights, and received payment accordingly from the Spreckels Company (p. 532).

It is now submitted:

(1) The existence of an overage, or overrun, of the coal in stock, in excess of the custom house weights, by 2.8 per cent, so far from being a fact "which excludes every other hypothesis but that of guilt" (*Union Pacific Coal Co. against United States*, 173 Fed. p. 740), was a normal condition, inherent in the business, "as consistent with innocence as with guilt," (*Union Pacific Coal Company against United States, supra*), consistent, indeed, with no other interpretation but that of innocence.

(2) The existence of a difference, or net shortage, as between the invoice weights and the custom house weights, by less than 1%, so far from being a fact "which excludes every other hypothesis but that of guilt," was a normal condition, inherent in the business, "as consistent with innocence as with guilt," consistent, indeed, with no other interpretation but that of innocence.

It will not be said, then, that James B. Smith, or his co-defendants, were in a conspiracy to cheat the government out of import duties, or out of draw-backs, because there was an overrun in the coal stock, or a want of conformity between the invoice weights and the custom house weights; or be-

cause James B. Smith, or his co-defendants, knew, what every custom house officer knew, what every coal importer knew, that coal in stock did overrun, and that custom house weights did not coincide accurately with invoice weights.

EXPOSED ROD INCIDENT.

What substantial evidence, then, is there—what evidence at all—of the conspiracy alleged in this indictment; of the charge that James B. Smith and his two co-defendants conspired together to defraud the United States,

“and for the purpose of carrying out such conspiracy, combination and agreement, to maintain on the docks, wharves and barges owned, operated, controlled and occupied by said Western Fuel Company and by the said defendants at the port of San Francisco, in the State and Northern District of California, scales and weights which were to be and were fraudulently manipulated by the defendants to the end that said scales should record the weights of said coal desired by the defendants, and not the true weights of the coal placed thereon, and the said defendants did so manipulate said scales and weights and the method of weighing thereon, so that said scales and weights did record the weights of coal desired by said defendants, and not the true weight of the coal so placed thereon” (p. 7).

An act of fraud—the doing of something fraudulent by somebody—is not a conspiracy to defraud. Conspiracy requires the action of two or more; it imports an agreement between the parties, and then a criminal status supervening upon the agree-

ment; it is, indeed, the result of an agreement rather than the mere agreement itself, it is a criminal partnership. If one of these defendants actually tampered with the scales for the purpose of keeping the custom house weights down, that would be an act of personal fraud on his part, for which he would be answerable; it would not be a *conspiracy* to tamper with the scales. His co-defendants, who had not authorized the act, who had not taken part in it, who had not approved or ratified it, would not be responsible. They would not be conspirators with him. To draw them within the toils of a conspiracy to tamper with the scales, it would be necessary to produce some substantial evidence, either direct or circumstantial, not consistent with an innocent interpretation, of an agreement between him and them to do this wrong thing, and, as a result of that agreement, a criminal partnership for its accomplishment; but they must be shown to be his partners for the commission of the crime, and by substantial evidence consistent only with that guilty status. "A conspiracy is constituted," said the Supreme Court of the United States (*United States against Kissel*, 218 U. S. p. 608)

"by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes."

Is there any evidence that James B. Smith and F. C. Mills were in a criminal partnership, *inter sese*, or with anyone else, "to maintain scales and weights which were to be and were fraudulently manipulated by the defendants to the end *that said scales should record the weights of said coal desired by the defendants, and not the true weights of the coal placed thereon*"? None whatever. But there is evidence here, of a kind, on which the imputation is made, as to the defendant E. H. Mayer, that, some seven or eight years before the finding of this indictment, he was guilty of an irregularity in the operation of the scales at Mission Street dock, at a time when the custom house officer was weighing imported coal. Something, now, as to this evidence itself, and as to its legal quality and bearing in this appellate proceeding.

Coal was hoisted out of the ship and dropped into a receptacle or bin, called a hopper, and from the hopper, it passed down a chute into some coal cars standing on the dock, say, four coal cars, and these cars, moving by electric traction, were sent over the horizontal surface of the scales to be weighed. Rising up from the edge of the scales, like a building from the sidewalk line, was the scales house, and in that house was a room into which the beam ascended from the scales below, and from that beam, a rising beam as we have seen when weights were taken, the government weigher ascertained the weight of a given coal car, or of two cars at a time, and noted it, and a similar notation

was made by the checker or teller, in the employ of the Western Fuel Company, who stood by and followed and registered the weighing operations of the government officer. For instance, there was a government weigher named Arnold H. Freund; there was a company checker, one of these defendants, E. H. Mayer.

Now, then, the physical connection between this beam in the government weigher's office and the scales themselves, was made by a metallic rod which extended upwards from the scales through the scale house and into this office, there attaching itself to the weighing beam. The imputation is, that Mayer, sometime in 1905, while coal was being weighed, manipulated this connecting rod with his leg, as he sat at the table with the government officer, and in that way caused the beam to record a false weight for the scales on which the coal had been placed. It does not appear that either the government officer or the defendant Mayer took the incident, such as it was, very seriously; it does appear, and from the testimony of the government officer himself, that shortly after he had made a reference to the circumstance, this exposed rod was boxed in, and made safe against possible manipulation in the future.

It is only just to the defendant Mayer to say that he denies the existence of any irregularity in the premises. Indeed, he says that the scale rod was encased at the time of the alleged incident, and before he knew the witness, David Powers (p. 1995). It is to this witness, David Powers, and to the govern-

ment weigher, Arnold H. Freund, that the government looks for the evidence of this alleged wrongful interference with the scales.

David Powers is the "informer" in this case. He got his first work, after quitting school, from the defendant F. C. Mills, who, besides acting as superintendent for the firm of John Rosenfeld Sons, and afterwards for the Western Fuel Company, took contracts himself for the trimming of coal on steamers—for the adjustment and levelling of the coal in the bunkers, so that they might be filled to available capacity. From 1902 until 1904, David Powers was a time-keeper for Mr. Mills, on this work of trimming coal (p. 686). From 1904 to 1908, David Powers, while still keeping time for Mr. Mills, was employed, more or less intermittently, by the Western Fuel Company, upon the Pacific Mail dock, at the foot of Brennan Street (pp. 688-9). During this period, he had an occasional job as hatch-tender on the barges, but it was "very seldom", and acted, very seldom, also, as a checker on the imported coal (p. 739). Generally speaking, "during that four years," he "worked, at times, along the water front for the Pacific Mail Steamship Company," and he "was paid by the Western Fuel Company by the day" (p. 739). He was unable to say "how much time during that 1904 to 1908 period I was actually employed by the Western Fuel Company"; and "between the intervals of employment I would be doing nothing" (p. 739). "When not acting

as hatch-tender or weigher”—an infrequent thing, as we have seen—“I was probably in charge of the Pacific Mail Steamship Company’s tracks, *but I was only employed there occasionally, just as I was only employed occasionally by the Western Fuel Company as hatch-tender or weigher*” (p. 739).

In 1908, David Powers was sent to the Pacific Mail Steamship Company by Mr. Mills, as he testifies, to work for that company as a weigher. This employment lasted about sixty days (p. 697). It was not a continuous period, but from time to time, how many times, Powers was not able to remember (pp. 740-741). That was his first and last work for the Mail Company (p. 742). He says, “I quit them in disgust” (pp. 697-8), and leaves it to be inferred that the Mail Company was not receiving full deliveries of coal, that he reported the circumstance to the Mail Company’s superintendent, Mr. Chisholm, and was told so say nothing, and in consequent disgust he quit the service (p. 698). He explains, with more particularity on cross-examination, that he protested to Chisholm “on the very first occasion that he went to work for him” (p. 746), but did not then quit in disgust, but stayed on for awhile, and he cannot remember how long it was before he “quit in this disgust” (p. 747), nor is he able to remember whether he worked for the Mail Company, on and off, for an entire year before quitting in disgust (p. 747).

On leaving the Pacific Mail, David Powers goes back to the Western Fuel Company—his disgust

notwithstanding, he goes straight back—as a sort of roustabout—“checking, weighing once in a while, attending the hatch on the barges, and running the engines” (p. 699). It must be understood, at this point, that David Powers is not intimating any disgust, real or simulated, because of any fraudulent manipulation or tampering with the scales. What he is referring to, is the circumstance, that when coal was lifted out of the barges and discharged into the ships, the unweighed tubs, filled when the men “had to meet the hook”, did not have so much coal in them as the tub selected for weighing by the government weigher—a tub that was filled during a halt in the transfer of a succession of buckets from barge to ship, and when the men in the hold of the barge, not called upon to meet the hook, were not under special pressure and haste in shovelling coal into the tubs. We shall have occasion to consider, more particularly, this operation. But it is nowhere testified, not even by David Powers, that the scales on the barges were fraudulently manipulated, or that any greater weight of coal was made to appear by those scales than the true weight of the coal actually placed thereon.

David Powers remained with the Western Fuel Company until 1911, when the company discharged him, and this brings us to his conviction and imprisonment for smuggling opium. He is a discharged employe of the Western Fuel Company, and he was discharged for this crime. At

the same time, a contract in which his father was interested with Mr. Mills, for the trimming of the Mail Company's coal, was taken away (pp. 760-761).

It appears from the testimony of Powers, that shortly before his own arrest for smuggling opium, he had gone to Mr. Mills with an accusation of opium smuggling against the barge-tender of the barge "Melrose"—some two or three weeks before (p. 753). He claimed to have caught this man with the opium, but gave him a chance to throw it away. Mr. Mills thereupon discharged the barge-tender (pp. 753-4). It was within three weeks after this accusation, that David Powers and a man named Feidler smuggled opium off the Mail liner "Siberia", hired a Crowley launch, and took the skiff of the barge Wellington, and carried the opium across the bay, where they were both arrested (p. 757). Powers was released from sentence and imprisonment in the county jail on the second of July following (p. 766). His crime, conviction, and imprisonment constitute the "little trouble", as the result of which "I left the Western Fuel Company's employ" (p. 750).

Powers next appears as an informer, interested to the possible extent of 35% of recoverable penalties, and as a witness "bought and paid for". Powers himself, flatly contradicted as to this by Tidwell, recanting himself later (p. 794), says that Tidwell did not tell him that he would receive a

portion of the fine—nothing of the kind (p. 730); but he does remember that somebody told him “that there are United States Statutes which apply to such cases as this, and which give to the informer a percentage of the fines” (pp. 730-731).

“Q. Who told you that?

A. Oh, I have forgotten the party’s name.

Q. You have forgotten the party’s name?

A. Yes.

Q. Did the party tell you what proportion of the fines the informer would be entitled to in such cases?

A. I have forgotten.

Q. You have forgotten whether he told you the percentage or proportion of the fine that the informer would be entitled to in such cases?

A. Yes, sir” (p. 731).

And again:

“Q. Where was this party at the time you had this conversation with him?

A. I don’t remember.

Q. When was it that you had this conversation?

A. I don’t remember.

Q. You don’t remember that?

A. I have forgotten the date.

Q. About how long might it have been?

A. Do you want me to tell you something I don’t remember?

Q. I am asking you, Mr. Powers, do you mean to be understood as testifying before this court and jury, and as wanting to testify that you have no recollection either in regard to the time or the place or the person with whom you had that conversation?

A. I forget.

Q. Well, can you state at this time whether or not there was more than one conversation in which that statute and that matter was mentioned in your presence and hearing?

A. I don't remember.

Q. Can you recall at this time whether or not there was more than one person who mentioned that statute and matter to you?

A. I forget now.

Q. Well, now, Mr. Powers, have you ever stated to anyone that you did expect to receive a large amount of money from the United States government as a result of the information you had furnished in this case?

A. I don't remember.

Q. Mr. Powers, don't you know that you you have made that statement?

A. Didn't I just tell you that I didn't remember.

Q. I ask you, don't you know, Mr. Powers, that you have made that statement?

A. Didn't I answer that I don't remember?

Q. Answer the question yes or no.

A. I just told you I didn't remember.

Q. Can't you answer that question and tell me yes or no?

A. I told you I didn't remember.

Q. That is all the answer that you will make?

A. That is sufficient, isn't it?

Q. Well, I am not arguing that with you, but can you answer any more definitely than that?

A. No, sir'' (pp. 731-2).

In connection with this testimony of Powers, should be read the testimony of W. H. Tidwell, the chief special agent of the government in this prosecution, whose name, as appears from the indictment, is the name of the single witness upon whose

testimony the grand jury preferred the pending charge. Tidwell testified:

“Q. Did you tell David G. Powers, or did you not tell David G. Powers that a man back in New York had received a very large amount of money from the government by reason of information furnished in a sugar case back there?

A. I do not remember ever discussing the sugar case with Mr. Powers, but as previously stated, Mr. Moore, I do recall discussing the matter of reward with him.

Q. Now, I would like to ask this question: Is it not a fact, Mr. Tidwell, that at the first interview with Mr. Powers you told him that under the statute of the United States you would be able on recommendation, or that the government would be able, by reason of that statute to pay him a reward, or a proportion of the fines or penalties that might be imposed?

A. As I recall it, the matter was discussed between us on the first meeting, but it was a question of moneys recovered on account of the information furnished and not of any fines which may be assessed. I think the law is that up to 35 per cent of the amounts recovered, less the expenses, and so forth.

Q. What per cent, if any, was mentioned as between you and him?

A. In fact, I think I permitted him to read the law.

Q. You showed him the statute?

A. I think so.

Q. And what is that statute?

A. As I previously stated, that an informer could receive up to as high as 35 per cent, within the discretion of the secretary of the treasury, of any amounts recovered, less expenses, and so forth.

Q. Is it your recollection that you exhibited that statute to him also at the first interview that was held between you?

A. I would not say it was the first one, but I exhibited the statute to him.

Q. As I understand you, Mr. Tidwell, that was with respect to a civil suit, was it not?

A. Yes, sir" (pp. 2076-2078).

This, then, is David Powers—a discharged employe, a convicted and imprisoned smuggler, an informer with his eyes on the penalty, looking to be "indemnified, remunerated and despised". But he is this, and something more, he is provably a witness "bought and paid for" at \$3 a day (p. 844). It is the fact, odious and scandalous, but the fact, that David Powers was a bought witness. No sooner had he qualified himself to Tidwell as an informer, than Tidwell, with full knowledge of his personality, his criminal record, and his past, and with a plain purpose to use him as a witness in the trial of this case, purchased and hired his time and his adhesion with the moneys of the taxpayers of this country, clothed him in the mantle of a public servant, and made him into a member of the government service in the capacity of a special agent. Such a transaction, if it could be laid at the door of a private citizen, would be called subornation. And Tidwell was artful about it. He hired Powers on the installment plan, from period to period, in the way of temporary appointments for 90 days at a time. Powers himself testifies:

"Q. When were you first put on as a special agent for the government at the recommendation of Mr. Tidwell?

A. Sometime during 1913.

Q. Sometime during 1913; can you be more definite in your answer with respect to that than by answering sometime during 1913?

A. I don't know the exact date.

Q. No, I am not asking you for the exact date, Mr. Powers, but approximately when was it, please, in 1913, that you became a special agent?

A. Oh, it was back in—it was in 1912 rather, back around August, I believe.

Q. Oh, it was not sometime in 1913, according to your present recollection, but it was back in 1912 and around August, you believe?

A. Yes, sir.

Q. For what length of time would you be appointed in each instance upon the recommendation of Mr. Tidwell?

A. Ninety days.

Q. It was a temporary appointment as special agent for 90 days which could be had upon his recommendation, was it not?

A. Yes, sir" (p. 720).

To illustrate: Powers was a witness in the smuggling case of Robert Donaldson, during the year (p. 771) for which he was employed in the public service. He testifies that within a few days of the trial, he ceased to be a customs agent, and within a few days after the trial, possibly the next day, he went on again as a customs agent, but he had it in mind all the time that he was to become a customs agent again (p. 798). Powers further testifies (pp. 769-770):

"Q. You figured that you would be regularly employed, do you mean?

A. Yes, sir.

Q. You would become a permanent official of the government?

A. Yes, sir.

Q. Then you did have something in your mind about getting a job, did you not?

A. Well, I thought they might, but that was not my reason for telling him.

Q. Well, without regard to what your reason was, did you think that they might give you a job?

A. Yes, sir.

Q. And you thought it ought to be a permanent job?

A. Yes, sir.

Q. None of those 90-day propositions; is that right?

A. Yes, sir."

Indeed, this venal service by Powers as an officer in the government employ, was the first time in his life that he "had been in a job on a regular monthly salary for a year" (p. 771). He had never been on a regular monthly salary with the Western Fuel Company for as long as a year (p. 771).

Our point, now, is this: that even in testimony as infamous as that of David Powers, there is no substantial evidence, there is no evidence whatever, of a conspiracy by these defendants to manipulate the scales in fraud of the government, to the end that the scales should register, not the true weights, but false under-weights of the coal placed thereon. The farthest range that can be given to the testimony of Powers, will not expand it beyond an imputation that in 1905, some eight

years before the finding of this indictment, E. H. Mayer, a defendant in this case, interfered with the rod connecting the scale house beam with the scales below. But Mayer is not on trial for some ancient and outlawed deception, with which his co-defendants have not been connected. The charge here is conspiracy—a criminal partnership to defraud the government in a specified way, as the result of a previous agreement among the partners. What is Powers' testimony as to this incident of the "manipulated" scale rod?

Powers first undertakes to fix the time, loosely between 1904 and 1908. We give his words: "During the years 1904 to 1908, I frequently visited"—now he specifies the place—"the *Mission Street* bunkers, more often indeed than the *Folsom Street* bunkers" (p. 696). On these occasions, he would see Mayer; "he was located in the scales house, weighing the incoming coal and checking it with the government weigher" (p. 696). Next he speaks of the rod: "The rod which connects the bottom of the scales with the mechanism below the floor of the scales house at *Mission Street*, was *exposed* for the entire distance between the table of the scales and the floor of the scales house" (p. 696). He goes on to tell what Mayer did:

"Mr. Mayer used to sit right next to the rod, with his feet on the rod, I saw him put his feet up against that rod *several times*, he used to talk about it himself" (p. 696).

A word of caution here,—not to confuse the precise point, the manipulation of the scale rod, now

in hand. Powers goes on in the next sentence, to speak as follows:

“He used to boast about how much money he was making and how he was robbing the government and robbing the ‘lime juicers’, as he used to refer to them meaning the steamers that used to come there for the Western Fuel Company; every time you would meet him he would tell you about how much he stole or what he was doing.”

Powers is not referring here to the scale rod, but to something in no way involving any manipulation of the scales themselves—he is referring to a “bent link” between two of the coal cars, and he is imputing fraud to Mayer because of the alleged effect of the bent link upon the registered weight of the coal. This comes out in his testimony as to the bent link, a matter which we shall attend to presently. He says (p. 704) that a government weigher made the blacksmith change the link,

“and Mayer spoke about it and said, ‘Why, gee, we ain’t doing a thing to these lime juicers and these other people (he meant the government) with the bent link between the second and third cars’. There were four cars to the train, and the link was between the second and third cars. Mayer told me how he was defrauding the government with this link.”

We have Powers, therefore, stating that between 1904 and 1908, at the Mission Street dock, he saw Mayer put his feet up against the exposed rod several times.

His next statement as to the exposed rod is on cross-examination (p. 776). He says:

“I saw the defendant Mayer with his foot on the exposed rod of the scales at Mission Street dock No. 2, both before and after the discharge of the ‘Dumbarden’. It occurred many times before the discharge of the ‘Dumbarden’, it was a common occurrence, I saw him do it *in 1905*.”

Three things are to be noticed in this testimony: first, that the occurrence is fixed in time by reference to the discharge of the “Dumbarden”; second, that the thing occurred, it was a common occurrence, *before* the discharge of the “Dumbarden”, although he saw it done both before and after; and third, that he saw Mayer do it, not vaguely, between 1904 and 1908, but in 1905; and 1905 is the time that he fixes for the discharge of the “Dumbarden” (p. 825). We are not to be misled by the expression “many times”, or “a common occurrence”; for Powers is not precise in his use of terms. The expression which he uses on direct examination is, as we have already quoted, “several times” (p. 696). But a thing which occurs “several” times, is, with Powers, a “common occurrence”, and of this we have an object lesson in his direct examination (p. 697). He is there testifying as to coal dropping into the bunkers from the hoppers without being weighed, and of carloads of coal being emptied into the bunkers, at the lunch hour, without being weighed at all. No fraudulent manipulation of the scales is here imputed by Powers, but we call attention, at this place, to his looseness of language, and to his con-

founding, and employing interchangeably, such expressions as "a number of occasions", "many times", "several times", and "common occurrence". His testimony is an object lesson, it speaks for itself, and we now give it from the record (pp. 696-7):

"On *a number of occasions*, at noon or at five o'clock, I used to see the chutes underneath the hoppers at Mission Street opened up so that the coal would run into the bunkers. At such times the government weigher would be away eating his dinner, or if it occurred at night he would be at home. I never saw any government inspectors on the dock at noon-time or after the men were laid off at night. I could not say *how many times* I saw that practice indulged in, but it occurred *several times*. It was *another common occurrence* at Mission Street to load up the car when the weigher had gone to lunch, pass over the scales with it, and at five or ten minutes to one empty such car into the bunkers, and then load it up again and have it ready for the weigher when he came back at one o'clock. Such carload of coal would not be weighed at all."

The net result is, that whereas, on direct examination, he sees Mayer with his foot against the exposed rod, several times, in some vague interval between 1904 and 1908, the cross-examination brings him down to more specific data, he fixes upon the year 1905, and he makes special reference to the ship "Dumbarden", which was discharged in that year.

Further cross-examination brings him still nearer to the identifying marks of the transaction,

to the weigher, Mr. Freund, who was present at the time when Powers saw Mayer with his foot on the rod, and again, and with more particularity of reference, to the ship "Dumbarden". It will be desirable to have his testimony before us (pp. 824-7):

"Q. Now, who was the weigher that was present at any time that you claim to have seen Mr. Mayer with his foot upon the rod of those Mission Street scales?

A. I don't remember, but I do know of *one weigher* that used to warn him to sit back from the scales *all the time*.

Q. Were you present at the time that he gave him that warning?

A. *I believe* I was, yes.

Q. Will you state the name of any weigher whom you saw present there at a time when you say you saw Mr. Mayer with his foot upon the rod?

A. Yes, *Mr. Freund*:—not upon the rod, but I have heard him tell him to keep away from the rod, to step back.

Q. I am asking you now, Mr. Powers, to state the name of any weigher whom you ever saw present there at a time when you say Mr. Mayer had his foot upon the rod?

A. I don't remember.

Q. How many years ago was this?

A. It was many times during the time that I have been around here.

Q. How many years ago would *the last occasion* have been?

A. I would not say about that, *I forget*.

Q. Can you remember *the name of any ship* that was discharging in connection with which that occurred?

A. I believe, or think, it was the '*Dumbarden*'.

Q. You think it was the 'Dumbarden'?

A. Yes.

Q. Well, that was the ship that ran so many tons short, was it not?

A. That is my belief, yes.

Q. Don't you know that Mr. Mayer was not even the weigher upon that occasion?

A. No, *I believe* he was the weigher on that occasion.

Q. Were you present on that occasion while that ship was discharging at the top of these bunkers?

A. *I believe* I was.

Q. Have you any recollection that in point of fact you were present during the discharge of that ship?

A. *I believe* I was; *I think* so; *in my mind, I believe* I was.

Q. In your mind you think you were?

A. Yes.

Q. Are you positive that Mr. Mayer was the weigher who officiated upon the discharge of that particular vessel?

A. Yes, *I believe* he was.

Q. Now, can you name—that was back in 1905—

A. *Yes, before the earthquake.*

Q. Now, can you name any other ship?

A. *No, I don't remember.*

Q. Well, the ship's clerks are present on those occasions, too, are they not?

A. On some occasions.

Q. Are they not generally present?

A. There are times that I have not seen any clerks up there.

Q. Well, then, in the great majority of instances?

A. At times, yes.

Q. Well, was there any ship's clerk present on any of these occasions when you claim you saw Mr. Mayer with his foot upon the scale-beam?

A. *I don't* remember of the clerk being present.

Q. You don't remember?

A. The ship's clerk.

Q. Now, you have weighed on these scales, yourself, have you not, and other scales?

A. Yes.

Q. Well, now, do you know it to be a fact that if there is any extraneous pressure or pulling on a beam of that kind, that it makes the scale extremely wabby and it becomes at once visible, that motion of the beam?

A. I only *heard* just what Mayer did to it.

Q. Well, do you know, yourself, from your own observation as a weigher, whether or not that is the case?

A. I never tried it, no.

Q. Then you don't know as to whether or not, if there is any pulling on the scales, one side or the other, or on the beam, that it makes a wobbling and uncertain motion?

A. No.

Q. Can you give the names of the ships, *or any of the ships*, that you claim were weighed by you?

A. No, *I don't remember* them.

Q. Well, in all those years during which you at intervals were weighing ships on these bunkers, can't you furnish us *with the name of one* that was weighed out by you?

A. No."

We go, now, to the testimony of Mr. Freund, and it will light up the point if we take with us what Mr. Tietjen says. Mr. Tietjen was an expert scales-man, for fourteen years the scales adjuster of the Fairbanks-Morse Company (p. 1377). He is asked:

"Q. What is the effect of the pressure of one's foot against the beam-rod?

A. The minute you put your foot against the beam-rod *it will stop the scale from weighing*. It is really hard to tell how much pressure, it is according to how hard you put your foot against it.

Q. A slight pressure might make quite a difference in weight?

A. Yes, maybe 100 or 200 lbs.

Q. That is, the mere pressure of the sole of the foot against the beam-rod would make a difference of several hundred lbs. would it not?

A. *Yes, probably 500 lbs."*

And, further:

"The mere pressure of the sole of the foot against the beam-rod would be indicated upon the beam so that *anyone accustomed to using the scale could detect it immediately*; the beam would stick right in the center and would not move at the time the pressure was put on it" (p. 1392).

Mr. Freund was "accustomed to using the scale"; on pressure of Mayer's foot against the beam-rod, he "could detect it immediately". He had been a government weigher since 1904, and during the first six or seven years of his service, "about seventy-five per cent of my time was devoted to the weighing of imported coal" (p. 1172). While stationed mostly on the barges, "it was, however, of frequent occurrence that I would be stationed on the Mission Street or Folsom Street bunkers weighing imported coal" (p. 1173).

Mr. Freund testifies:

"I am familiar with the rod which depends from the beam on the Mission Street scales

where the coal is weighed. During that part of the time when I was employed as assistant weigher upon the Mission Street bunker, that rod was exposed. *I can't say for what length of time, however.* If I remember, when I worked there *the first few times* the rod was exposed; then I was away for a time, and when I came back *I found they had boxed it in.* I am acquainted with the defendant, Eddie Mayer, and have known him since I have been in the service. I recall *an occasion* when he was located in the scales-house at the Mission Street dock and permitted his feet to come in contact with that *exposed* rod. I don't know exactly when that occurred, but I think it was just *before the fire of 1906.* He was keeping check with me in the scales-house, which is his ordinary duty. He would sit on the north end of the scale. I sat on the south end, where the hanger beam was. We were both facing east. There is a table underneath the beam. Both of us used the table in keeping our books.

Q. Just go ahead and relate all the circumstances connected with this occasion to which you are testifying.

A. Well, as he stepped out, as I say—I don't know what for, but to tell the motorman where to distribute the coal to that was going to various pockets, why, I took a piece of chalk out of my pocket, and I rubbed this rod, and when he came back and sat down, and after I had weighed a load, he sat back and put his feet up on the desk, kicked his chair back, and I says, 'Eddie,' I says, 'Where did you get the chalk on your pants?' and he says, 'Darned if I know.' 'Well,' I says, 'you want to keep your leg away from the rod and cut out your monkey business' and he laughed and called me a lobster, or something, I have forgotten which, *and I simply told him that; that was the end of it, I never bothered with him after'* (pp. 1173-1174).

The testimony of Mr. Freund, then, fixes the occasion—"just before the fire of 1906;" neither he nor Mayer seems to have taken it very seriously; he cautions Mayer to keep clear of the rod—"I simply told him that; *that was the end of it*, I never bothered with him after;" Freund saw the rod exposed, "when I worked there *the first few times*;" "then I was away for a time, and when I came back I found *they had boxed it in*".

It is quite clear, now, that this incident of the exposed rod does not indicate, to the exclusion of any rational view consistent with innocence, or at all, the existence of a conspiracy among these defendants to tamper with the scales, so that, in the fraudulent manipulation of those scales, they would not register the true weight of the coal placed thereon. This rod incident is remote, isolated, personal to Mayer, out of connection with James B. Smith or F. C. Mills. It not only occurs eight years before the return of this indictment, but it is confined to the Mission Street dock, there is not the slightest evidence of such an occurrence at any other dock—at the Green Street dock, or the Vallejo Street dock, at the Howard Street dock, or, again, at the Folsom Street dock, where Mayer was largely occupied, and where the principal weighing operations of the Western Fuel Company were conducted. In the case of Australian and Japanese cargoes, the weighing, as in all other cases, was by a government weigher, and in the presence of the ship's clerk; in the case of a chartered ship, where the charter rates

depended on the custom house weight of the cargo, a representative of the chartered ship, naturally enough, was present; at times, as many as three other people besides the government weigher and the fuel company's checker (pp. 784, 1190); and in all cases, without an exception, the weighing of the imported coal was done by the custom house weigher, who, as Mr. Tietjen says, and as Mr. Freund makes clear enough, would "detect immediately" the manipulation of the scale-rod. The charge of conspiracy is exploded. Tidwell himself is brought to say (p. 572):

"The coal which went into the inshore bunker was not, so far as my knowledge goes, weighed in any different manner, in so far as it was weighed at all, from the coal that went into the offshore bunker. That is to say, my understanding is that the coal which went into the offshore bunker was weighed on the same scales as the coal which went into the inshore bunker. I have said that the coal which went into the offshore bunker was correctly weighed. The scale was not manipulated in reference to that coal, so far as I know. The coal destined for the inshore bunker, which actually went on the scales, was weighed in the same manner as that which was destined for the offshore bunkers. My information is, and I have so stated on redirect examination, that every pound of coal that went into the offshore bunker was accurately weighed."

BENT LINK INCIDENT.

We now come to the incident of the bent link—"That occurred, I think," says Mr. Freund, "around

1906, but I don't recollect whether it was before or after the fire, it was close to that time" (p. 1183). Four coal cars, linked together, would be moved up to the scales, and weighed two cars at a time. One of the links, the one between the second and third car, or rather the angle iron, had struck something, and had got bent or twisted (p. 1353), and the effect seems to have been, as Freund understood it, that this short or bent link in some way held the two forward cars up on the scales a little, making an underweight of about 2000 pounds (p. 1185). On the discovery of this defect, Mr. Freund called attention to it, and Mr. Mills or Mr. Smith, one or other of them, had a longer link put in at once (p. 1185). The first witness to speak of this link is David Powers. He does not pretend to have seen the link himself, and his testimony does not go beyond putting a statement in the mouth of Mayer. We have already quoted this statement in explaining Powers' testimony as to the lime-juicers and the government (p. 704),—in substance, that Mayer claimed to be defrauding the government and the lime-juicers with this link. Powers continues:

"I was present when the existence of the link was discovered. Murray (government weigher) weighed a trainload of cars and was not satisfied with the result; so having weighed the train going one direction, he then switched it back and weighed it going the other, and the discrepancy in the weights was revealed. I did not see the link myself. Mayer told me that the link was bent in such a way that it would lift a certain amount of weight off the last two

cars. He did not tell me how long the link had been in use. Billy (referring to W. R. Olinder, Blacksmith and Machinist for the Western Fuel Company) removed it. I don't know whether they put it back or not. I didn't pay any particular attention to it, though I saw it being taken out" (pp. 704-5).

On cross-examination he introduces Mr. Freund as having been present on the occasion of the bent link (p. 781); he never took the trouble to look at the link, paid no attention to it (p. 781), (p. 783); the blacksmith, he says, was sent for, and took the link out (p. 783).

This blacksmith, W. R. Olinder, testified that he and his helper, Mr. Ewing, made the links that couple up the cars (p. 1352). Some question was raised as to whether this incident took place at Folsom Street or at Mission Street (p. 1357). Olinder puts it at Mission Street, and five or six years ago (p. 1353), it may have been before the earthquake and fire of 1906 (p. 1355). The scales were examined, both by Olinder and by a man from the Fairbanks-Morse Company, but there was nothing wrong there.

"There is an angle iron," says Mr. Olinder, "about two and a half inches by one-half, that holds the draw-head that hooks the two cars together. The link was all right, but the angle iron had come in contact with something and had got bent or twisted, and I saw that I could not put the link back again, so I made three new links out of an old chain, so that they would have free play to get clear. After that they were all right. It was in the middle section

of the train that the draw-head was bent. They continued to operate those particular cars with the three links I had put in, until I had time to throw that car out. I don't know when that was, but I made the repair on the car and put a new angle iron in there, and paid no more attention to it" (p. 1353).

He further explains that these coal cars sometimes run off the track, without getting entirely clear of it; "they get lop-sided so that half of the car goes off, and all out of shape" (p. 1354). This would give the car "a kind of a twist" (p. 1354). "I have never at any time since I have been working for the Western Fuel Company, made a single link that was intended to give that company the best of it in weighing on the scales" (p. 1355). And to the same effect is the testimony of Wesley Ewing, Mr. Olinder's helper (p. 1362).

Indeed, there was no short-weighting in the ultimate and aggregate weight of the four-linked cars. Those cars were weighed, two at a time. The bent link between the second car and the third car is supposed to have lifted up a little from the scales the second car, while that second car was being weighed. The third car had to stand the pressure of this uplift, and when, in its turn, it went upon the scales for weighing, it was still linked to the second car, which had just been weighed, and it was still subjected to that pressure. In other words, the weight of the second car, so far as it went, which missed the scales, was accounted for and reflected in the added weight of the third car. As Mr. Tietjen,

the expert scales man of the Fairbanks-Morse Company expresses it, "the weight taken off the car that was on the scale will be added to the car that is off the scale" (p. 1988). Mr. Tietjen explains and demonstrates this, with experiment and in detail, in his testimony (pp. 1988-1992). Mayer was not defrauding the government, notwithstanding the declaration attributed to him by David Powers. Mayer denies having made any such statement. But the incident, of course, is not evidence of a conspiracy, and in the absence of a foundation, the alleged declaration would not even be admissible. Finally, we come to the testimony of Mr. Freund himself. He says (pp. 1183-5):

"I recall an occasion when there was some trouble with a link connecting two of the cars on the Folsom Street bunker. That occurred, I think, around 1906, but I don't recollect whether it was before or after the fire. It was close to that time. I do not recall the particular ship that was then being discharged.

Q. I want you to go on and state in your own way what that transaction was.

A. Well, there are four cars worked up there and they are weighed two at a time; they are all linked together, one motor-car. I was weighing, and I think at that time Mr. Delaney was clerk for the Western Fuel Company. Having weighed the first two cars of a train, I think the weight went in the neighborhood of something like 17,500 and as they pulled off and they weighed the second two, I saw that the cars were heavily laden and I thought that there must have been something wrong with the weight, so I insisted on the motorman bringing those cars back and reweighing them.

Q. How did you happen to look at the cars on that occasion?

A. You can't help it; here is the run-off and they come out right underneath the scale-house. (Indicating.)

Q. (Indicating). And you did, upon that occasion, observe that the two cars which you weighed were pretty well laden with coal?

A. Yes, and I had the motorman back up his cars, and I reweighed them, and where they first weighed something short of 18,000, the next weight was about 25,500.

Q. The same two cars?

A. The same two cars exactly. I could not understand it. They have a little 'phone in the house there connected with their office down below, and I rung up Mr. Miller, and I said 'Billie, will you ring up the custom house and have Mr. Wooster come down'; he said, 'What is the matter?' I said, 'There is something wrong, I am getting the worst of it up here, have Wooster come down.' So Mr. Wooster came down with Mr. Jim Smith and Mr. Mills and came up and I told them and they couldn't seem to understand how it could be. I went down below with them and Mr. Delaney done the weighing upstairs.

Q. Before you proceed with your statement let me ask you this: The motor and the train of cars are headed as it comes upon the scales in a westerly direction?

A. Yes, sir.

Q. And you ran the *first two cars* upon the scales; is that correct?

A. Yes, sir.

Q. And took the *first weight*?

A. Yes, sir.

Q. Then you ran the *rear two cars* upon the scales and weighed those two cars?

A. Yes, sir.

Q. Then, as I understand it, you required the cars to be pushed backward, that is, in an

easterly direction, and you again weighed in that way the first two cars?

A. I did.

Q. After Mr. Wooster, the defendant, James B. Smith, and Mr. Mills reached the scene of activities, state what occurred.

A. They came up and they looked it over and could not understand it, and finally I believe they rang up and got the Fairbanks scale man down, and Mr. Wooster told me to keep ahead, go ahead and weigh so as not to delay the game; and in the meantime he went on the scale *and he found the scale was perfect*; then we discovered that there was a short link *between the second and the third cars* that when *the first two* got on, the short link in some way *held the cars up a little on the scale* in order to make a difference of somewhere around 2,000 lbs.

"I believe this link was shorter than the links between the other cars. I examined the link myself. I should imagine it had been in service some time. I don't think it was a new link, but I didn't notice particularly. I cannot describe the link in any way. I did not notice any peculiarity about it. *Mr. Mills or Mr. Smith. I don't recollect which, immediately ordered that a longer link be put in.* I have no idea how long that particular link had been used. I had been weighing that train of cars right along for some time."

Mr. William J. Delaney, Deputy Collector of Internal Revenue (p. 1188), is mentioned by Mr. Freund as having been present on the occasion of the bent link. Mr. Delaney has this to say (p. 1189):

"I recall an incident which occurred at the Folsom Street bunkers while I was employed there (in 1905, p. 1189), when there was some

claim made that inaccurate weights were being taken. The assistant weigher at that time was Mr. Freund. Some one or other of us noticed that the scale wasn't weighing properly. There was something wrong with the way the scale was registering so we took steps to have the scales fixed. Mechanics from the Fairbanks-Morse people came down, accompanied by Mr. Wooster, the chief weigher and we knocked off work until the scales were put in order. There was nothing more particularly the matter with the scales than that one of them did not weigh properly."

SCALES-BLOCK INCIDENT.

So much for the bent link incident. It is quite possible that the incident referred to by Mr. Delaney, particularly since he mentions Mr. Wooster, the chief weigher, was not the bent link incident, but another incident, occurring also in 1905, when the scales got out of order, and were promptly repaired and corrected by the Fairbanks-Morse Company. David Powers, while not professing to have any knowledge on the subject, mentions the matter in the way of putting a statement into Mayer's mouth: "I had a conversation," he says, "at Mission Street with the defendant Mayer before the discharge of the 'Dumbarden'". It has already been seen that the "Dumbarden" was discharged in 1905. Powers proceeds to give the conversation: "Mayer then told me that the scales would rest or be upheld by blocks or uprights underneath, so they would not register the true weight, he told me he knew all about it" (pp. 703-4). This is all that Powers has to say. A witness, J. L.

Bley, has some "hazy" recollection of the incident—a San Francisco custom house broker. "I recall," he says, "a ship known as the 'Dumbarden', I recall in a hazy sort of way the discharge of a cargo of coal from her during the latter part of 1905" (p. 1193). At that time, he remembers the circumstance of visiting these scales. He is asked:

"Q. You say you did make an examination of the scales at that time?

A. Well, I would not call it an examination, Mr. Roche, because I had never visited the waterfront practically on a mission of that kind before; I looked at them; I was only there about 15 minutes. I saw the scales, yes, if that is what you want to know, yes, I saw the scales.

Q. Was anybody with you at the time?

A. Yes, sir, the chief weigher.

Q. Upon how many occasions did you visit the scales?

A. I visited the scales once on this occasion.

Q. And did you again visit the scales upon a later occasion?

A. No, I did not visit the scales; I visited the bunkers" (pp. 1194-5).

Bley goes on to say that he was accompanied by Mr. Wooster, chief weigher at the time (p. 1195); and it was this circumstance which led us to suggest that, possibly, it was to this incident of the scales being out of order, not to the bent link incident, that Mr. Delaney was referring. Mr. Bley proceeds:

"Q. What part of the scales did you examine or did you look at, to use your language?

A. Well, it was that portion of the scales where the small cars ran over.

Q. You say that portion of the scales that the cars went over; do you mean the platform?

A. The platform-scale, yes, sir.

Q. Did you *examine* the surface of the platform, or did you go underneath the platform?

A. If my memory serves me I *examined* both; as you call it, I examined both the surface and a portion of the underneath part.

Q. How did you gain access to that portion of the scales located immediately underneath the platform?

A. I don't know whether they were open on account of some repairs or whether they had been opened; that was eight years ago.

Q. You are acquainted, are you not, with most of the defendants in this case?

A. No, sir, I am not.

Q. Do you know Mr. Smith?

A. I have met Mr. Smith, yes.

Q. Just go on and state what you observed after entering the space which is located immediately below the platform of the scales?

A. Mr. Roche if I could refresh my memory up a bit I might be able to tell you more about that. *It was eight years ago, and it was only a 15 or 20 minute transaction, and I have been through thousands of them—I don't mean similar transactions, but thousands of other transactions, and in practically every part of the world.*

Q. What do you mean, Mr. Bley, to refresh your recollection from what?

A. From a drawing of the scales.

Q. You say you did go into this space which was located below the platform of the scales on the Folsom Street dock; you recall that, do you not?

A. I recall that, yes, sir.

Q. Do you recall observing any uprights located underneath the platform scales?

A. Yes.

Q. You are certain about that, are you?

A. Well, I am certain—I remember there were uprights there; I remember that.

Q. Do you recall making an examination of that portion of the scales for the purpose of ascertaining whether the platform of the scales would come in contact with any one of these uprights or with anything underneath the platform?

A. I did.

Q. Now, just go on and tell the jury what you saw?

A. Well, *I don't like to make a definite statement because it is eight years ago and there might be some little detail I might not be correct in.* To the best of my knowledge and belief there was one of the uprights that appeared to have had the platform resting upon it.

Q. Do you recall examining the remaining three uprights?

A. No, I do not.

Q. Is your recollection today the same as it was at the time you made a statement to Mr. Sullivan and to myself?

A. It is the same.

Q. You don't think there is any difference in it?

A. No, no difference.

Q. Let me ask you, haven't you a recollection of examining the tops of the other three uprights underneath these scales for the purpose of ascertaining, if I may refresh your recollection, whether there was any dust upon the tops of these other uprights, or not?

A. It is my impression that there was one of them on the same side that showed that the

scale had touched it that had dust on it. That is my impression.

Q. But it did show that the scale had come in contact with it?

A. On the upright I saw the dust on?

Q. Yes.

A. No, I don't think the scale came in contact with that one; it came in contact with the one I just called your attention to. I remember that there was one of them that the scale came in contact with.

Q. Have you any recollection at this time as to how many uprights there were located under this platform? Do you remember there being an upright at each one of the corners of the platform?

A. My impression is there were four.

Q. Now, eliminating from consideration the particular upright with which you say the platform came in contact, do you recall the space which you observed existed between the remaining three uprights and the platform of the scales? How many inches above the tops of those other three uprights was the platform? Haven't you any recollection upon that subject at all?

A. Why, *it is very hazy* as to the distance between the platform and the top of the upright.

Q. I am not talking now about the particular upright that you say the scale came in contact with, but I am talking about the remaining three uprights. Do you now recall the space which existed between the tops of the other three uprights and the platform?

A. I do not.

Q. Do you recall whether you examined the tops of these three uprights for the purpose of ascertaining whether any part of the platform of the scales had come in contact with any one of those uprights?

A. My impression is that after looking at the other upright on the same side as the one that had been touched by the platform above the one that was out of order, or whatever it was, that I did not examine anything further, and I called the weigher's attention to it.

Q. Had the top of the upright which apparently had come in contact with the platform of the scales been worn down to any extent, and if so, to what extent?

A. Well, it was to some extent; I cannot recall to what extent it was worn down, but it was to some extent; that is, it was visible to the naked eye that the platform had rested on it.

(WITNESS continuing). The upright that I examined had apparently been worn down at a recent date. I remember the chief weigher contended that it must be of recent origin, but my contention at the time, if I remember correctly, was that it might have been for some period past.

Q. Do you recall whether the upper part of this upright was removed?

A. Mr. Roche, I will have to state that all I know about that is what was told me by Mr. Wooster.

Q. Do you recall whether the block which you did see at a subsequent date corresponded with the upper portion of the upright as you observed it while under the scales?

A. The block that was shown me by Mr. Wooster corresponded with that portion of the upright.

Q. Where was the block at the time it was shown to you by Mr. Wooster, if you recall?

A. It was probably at the custom-house.

Q. *Your recollection is not very definite upon that subject, that is as to the exact place?*

A. No.

Q. Do you recall whether there was any dust of any kind upon any part of the top of this upright which apparently had come in contact with the scales?

A. I believe there was.

Q. Do you recall the dimensions of the upright? I don't mean so far as height is concerned, but the width and the thickness of it?

A. My impression is it was 6 by 6.

Q. Are you at all certain, Mr. Bley, that there was any dust of any kind upon the top of this upright, which apparently had come in contact with the scales?

A. I believe there was.

Mr. ROCHE. Q. What I am trying to get at, Mr. Bley, is, is that a definite recollection?

A. *No, sir, I could not state definitely*" (pp. 1195-1200).

This is the direct examination of Bley, all of it; he was not cross-examined, and Wooster was not produced.

The fact of the matter is this: in August, 1905, the ships "Germanicus" and "Dumbarden" were discharged,—with a shortage, in each case, between the invoice weight and the custom-house weight of, say, four hundred tons in a cargo of approximately six thousand tons (pp. 499, 503). The scale expert of the Fairbanks-Morse Company, Mr. Tietjen, was sent for, and made an examination of the scale in the presence of the government weigher. He found that the scale platform had sunk down on the catch blocks, that the difficulty was due to the constant using of the scales, which had been inspected by the Fairbanks-Morse Company only

three weeks prior to the discharge of these ships, and that there was no indication that the scales had been tampered with. The Western Fuel Company paid the duties to the government, in the case of each ship, not on the short weight of the custom-house, but at the figures of the invoice (pp. 502, 503). We now give the testimony of the scale expert.

“Three weeks before the incident of 1905”, says Mr. Tietjen (referring to the incident of the “Germanicus” and “Dumbarden”) “I put the scales in perfect condition; the bolts were tightened, the knife-edge sharpened, and the scales were in as good condition three weeks before this discovery of the resting of the platform on the uprights as they had ever been” (p. 1388).

In 1905, I visited the Folsom Street bunkers on the occasion of the unloading of the steamer ‘Germanicus’ and the steamer ‘Dumbarden’. They had a little trouble with the scales, and I found it and adjusted them. The manager of the Fairbanks-Morse Company sent me down there, and I found that the scale had sunk down on what they call the ‘catch-blocks’ to hold the scale from falling through the wharf. The bolts were pulled through the corner and set down on blocks (p. 1377).

Q. What did you find was the trouble with those scales at the time you examined them on this occasion in September, I believe it was, in 1905, with refereince simply to the unloading of the ‘Germanicus’?

A. At that time when I went down I found that the scale had settled down on these blocks, that is, near, within a quarter of an inch of touching the blocks, and you really could not tell with an empty load but when you

would put a heavy load on it would bear right on the block and would bind the beam.

Q. What was the reason, so far as you observed it, for that scale settling in that manner?

A. The only reason I could give was either the bunkers or the bolts pulling down through the old timber.

Q. Will you point on this blue-print to the bolts that had become loosened, thus causing the scale to settle?

A. Right here (indicating).

Q. The bolts on the corner of this platform.

A. Yes, sir, on the four corners of this platform.

Q. Did you notice how many or to what extent the bolts had pulled or given away?

A. No, they often pull down, especially if the timber is old, half an inch, $\frac{3}{4}$ of an inch or may be $\frac{1}{4}$ of an inch, or anything; it varies at different times.

Q. What was the size of those bolts; do you recall?

A. They were about $\frac{7}{8}$ inch bolts.

Q. Can you illustrate a little more particularly just how those bolts were attached to the timbers?

A. They were put down through the top of the timber, and they have a nut on what they call the corner-iron to hold the corner-iron up. They were round-headed bolts, probably an inch and a half or an inch and $\frac{3}{4}$ in diameter.

Q. Taking this corner of the desk here for the purpose of illustration, it ran from one corner to the other, did it?

A. It ran from the top side right underneath to the bottom of the frame.

Q. How long a bolt was that?

A. 13-inch bolt.

Q. Through what thickness of timber did it run?

A. Through 12 inches of timber.

Q. How was it attached at each end?

A. The top end had a round-head and the bottom had a large nut.

Q. A nut was screwed in at the bottom and a head permanently attached to the bolt on the top.

A. Yes, sir.

Q. What had given way there?

A. That nut had simply pulled down into the wood, the wood was soft, probably beginning to decay, or something, and it pulled it down in the wood.

Q. The nut had pulled down?

A. The whole bolt had pulled down.

Q. By reason of the nut giving way?

A. By reason of the whole pressure on top.

Q. What would be the immediate effect of that?

A. That would cause the whole scale to lower.

Q. And that brought it down on the catch-block?

A. Yes, sir.

Q. Do you know what kind of timber that bolt was imbedded in?

A. Yes, sir, Oregon Pine.

Q. Could the condition of that wood be due to the constant using of the scale, or was it due to any other cause?

A. *It was due to the constant using of the scale and the cars running over it; it was bound to pull it down with the continual hammering on it, and with the timber softening, it would pull into the timber.*

Q. *Was there any indication that that bolt or that scale had been tampered with?*

A. *Not that I could see or know.*

Q. You said that that was due, in your opinion, to the constant wear and the load that was placed upon the scale.

A. Yes, sir.

Q. Will you state whether or not, in your opinion, any other cause contributed to the condition of that bolt than what you have already stated?

A. Well, I don't know of any other cause. *It was simply what I call a natural cause; it is an every day cause; that is the way we term it, an every day cause, that is all*" (pp. 1380-1384).

And further:

"When I discovered that that bolt was loose I tightened it up and sawed the catch-block off a little so as to give a little more play to the scale. I found the scale about a $\frac{1}{4}$ th or $\frac{1}{8}$ th of an inch from the block.

Q. How much distance did you give instead of the $\frac{1}{4}$?

A. About an inch. That would be about the normal distance. The scale was in good working order after the change was made. There was no other imperfection about the scale at that time that I could discover. After the repair, I tested the scale myself and found it to be in good order" (pp. 1384-1385).

Again:

"I noticed the difference in weight at the time of the existence of that defect, caused by the platform resting on the upright. I went down there and we ran a car of coal on the scales and as soon as we did it, the beam on the scales stuck; it would not move; so then I got down underneath and examined it. I remember that you could move the pointer about a ton or three tons and then it would not register at all. The beam would just stick in the center and refuse to move. I have no idea how long that upright had

been interfering with the operation of the scales. I don't see myself why they would not see it when they were weighing. Mr. Wooster sent for me first. I was not surprised to find that the scales were out of order after I had repaired them three weeks before, because that happens often. The defect that I noticed was that the bolt had stuck in the timber. Probably the wharf got out of shape a little bit in taking on a cargo of coal. There was a pulling down through the frame of the scale. I remember hearing at the time from Mr. Wooster that the schooner 'Dumbarden' had weighed out 409 tons short in a cargo of 4707 tons. I don't remember the month in 1905 when this incident occurred. In answer to the question whether I, at the same time, discovered that the steamer 'Germanicus' had been unloaded at Folson Street with a shortage of 350 tons, in a cargo of 5950, I would say that all I know is that Mr. Wooster told me there was a big shortage; I didn't know what it was. There was complaint regarding the shortage on both steamers, however" (pp. 1388-1389).

Again:

"On that occasion in 1905 to which I have referred, a piece of the upright under the scales was sawed off by myself. I took off probably an inch and threw the piece away. Mr. Wooster may have kept it for a keepsake, I don't know.

Q. Was not that piece that you had sawed off the top, wasn't it quite smooth and polished as if pressure had been exerted on it for some time before?

A. Well, it showed, with the coal-dust on it, it showed it had been wearing on it.

Q. The other uprights that had not been touched by the platform were dirt-covered and were rubbed, were they not?

A. Yes, they always are.

Q. But that particular piece was smooth and was polished?

A. No, it was not polished, it shows where a little dirt had scraped on there. It showed a rub, that it rubbed there.

Q. It showed a rub?

A. Yes, sir.

Q. And it showed a friction that had been continued for some little time?

A. Yes, sir" (pp. 1391-2).

And further:

"Q. When you examined the scales previously to the time that the 'Germanicus' and the 'Dumbarden' were unloaded, did you also examine these bolts that you refer to?

A. No, I did not.

Q. So you don't know what the condition of those bolts was at that time?

A. No. You see, in taking out the scale we don't have to bother the corners, we just knock the pins out of the scale and we leave the bolts and the corner-iron in there and the link—we don't disturb that at all.

Q. What do you mean by the expression tightening the bolts?

A. Tightening the bolts is screwing the bolts up in the corner-iron; when they come down a little we screw them up and bring the corner-iron up against the lumber or against the timber.

Q. Did you have occasion to screw up the bolts you afterwards found loose?

A. Yes, sir.

Q. You did not notice, however, at that particular time what the condition of that bolt was?

A. No, I did not.

Q. Did you notice the condition of the timber around it?

A. Yes, the timbers were in fairly good shape, fairly good, but they were beginning to rot out a little.

Q. Will you state what effect would be indicated on the beams if the scales were touching one of those posts in the manner you have described, how that would show itself on the beam?

A. As soon as the bearing-plank would touch that post the beam would stay in the middle, it would not move. Otherwise you could move it out or in. It would just stick in the center, it would not move.

Q. The defective condition of the scale would become immediately noticeable?

A. Yes, sir, it would'' (pp. 1393-1395).

Mr. Tietjen says further:

“Q. Are you able to say at what point the scales cease to work when they are in a defective condition such as you found in 1905?

A. They showed they wouldn't work at all. When I went down and put on a car of coal in there the scales simply stood on the center, and I knew what was the matter, that there must be something either broke or hanging on the lever of the scale.

Q. You are not able to state then how much of a weight it was necessary to put on those scales in order to bring the scales down to the top of the block?

A. No. You could probably take and test it with a ton and it would go all right, but if you put 5 tons on it would go right down and rest on it.

Q. There would be a point beyond which it would not register weight?

A. Yes, sir.

Q. But you don't know what that point is?

A. No, I don't know what it is.

Q. It would register weights up to that point, whatever it is?

A. Yes; you may take the scale empty, and it would balance just as nice as it could, but when you put a load of five tons on it it would not work at all.

Recross Examination by Mr. Sullivan.

At the time when I made the examination in 1905, the scales would weight up to a certain point; that is, up to 1000 pounds or 2000 pounds, but when you got a heavier load, of probably 5000 pounds, it would stick. The weighing would not depend upon the position of the car on the platform at the time. Mr. Smith was not present at the time when I made my examination of the scales in 1905, nor was Mr. Mills or Mr. Mayer. The weigher for the Western Fuel Company was a gray-haired man. (Here stated by Mr. Moore that the weigher was Mr. Delaney.)" (pp. 1395-1396).

There only remains the testimony of Mr. Mills (p. 2112). He says:

"I remember a time when the scales got out of order on the Mission Street bunkers—I cannot give the year. The incident occurred in connection with the unloading of the 'Dumbarton' or 'Germanicus'. I went up there and looked at the scales and observed their condition. I found that the bunkers had settled, with the result that the scale, with a certain weight upon it, would rest upon what we call the protecting posts, of which there are four under the scales. As a result of this condition the scales did not register the correct weights. The purpose of those protecting posts was to prevent the cars from going down through the bunkers in case the scales should break.

As a result of the settling down of the bunkers which I have mentioned, the scales came in contact with one of those protecting posts. If that incident occurred in the year 1905, the bunkers at that point must have been about 10 years old. It might have been more than that. I am not quite positive as to the number of years."

And on cross-examination he said (p. 2134):

"I was present at the Mission Street dock when the upright was found supporting the platform of the scales. I did not notice that one of the uprights presented a smooth surface and that the others were covered with dirt. I did not examine the uprights for that purpose—I simply know what the Fairbanks Morse men told me—that the scales were resting on one of the uprights. I did not see it or examine it myself."

SUMMARY AS TO SCALES.

There are, then, these three incidents in the record: the exposed rod incident, the bent link incident, and the scale-block incident. And this is the evidence upon which the government attempted to sustain the charge of a *specific conspiracy*, notified to these defendants in the indictment, a *conspiracy* for the manipulation of the scales used in the weighing of dutiable coal, "to the end that *said scales should record* the weights of said coal desired by the defendants, and not the true weight of the coal placed thereon". The exposed rod incident was back in 1905. It was at one of the docks only, and that was Mission

Street dock. It was a matter pertaining to the defendant Mayer alone, Mr. James B. Smith and Mr. Mills had no connection with it, it was a thing between Mr. Freund and Mayer, and after Freund had spoken of it, the exposed rod was boxed in. The bent link was also an occurrence of 1905, and upon one dock only. It seems to have come about in the partial derailment of the weighing cars, more or less unavoidable, and indeed, the supply of new links was part of the duty of the Fuel Company's machinist and his helper. Mr. Smith and Mr. Mills are mentioned in connection with this incident, but to this extent only, that when the matter was brought to their attention, they promptly saw to it that the difficulty was corrected. The scale-block incident, with the settling down of the platform, was also an incident of 1905, at one of the docks only, and it is fully explained, without blame upon anyone.

**ATTEMPT TO SHOW A CONSPIRACY OTHER THAN THE ONE
DESCRIBED IN THE INDICTMENT.**

The case of the government, in one word, broke down on the conspiracy alleged in the indictment—for it is nowhere pretended, so far as coal weighed out from the barges into the steamships is concerned, that the scales upon the barges were in any way manipulated so as to record falsely the weight of any coal placed thereon. In this posture of affairs, what happened, what did the government do? It proceeded to try these defendants

for something else, for a conspiracy not specified in the indictment. Instead of making out a case against these defendants, such as the indictment goes upon, of conspiring to manipulate the scales, so that they should register falsely "the weight of the coal placed thereon", the government undertook to show that the dock-hands of the Western Fuel Company had attempted to get dutiable coal by the custom-house and into storage at San Francisco, without being weighed at all, or returned for duty, and that the barge-hands of the Western Fuel Company, in the process of making delivery to the steamships, so far from fraudulently manipulating any scales, had kept back from weighing or delivery at all, a certain amount of coal which should have been weighed out and delivered to the steamships, and as to which, on the assumption that it really had been weighed and delivered, the steamship company afterwards collected a draw-back from the government.

AS TO IMPUTED SMUGGLING OF COAL BY DOCK-HANDS.

The dock-hands and the barge-hands—and first, for the claim made as to the dock-hands. The point now making does not call, at this place, for any sharp analysis of the government's testimony, whether it be entitled to consideration as being substantial evidence of *any* wrong-doing, or whether it tend to show *any* conspiracy—the specifications of the indictment apart—to which these defendants were parties. The question here, is, whether the

crime alleged in the indictment is answered to by the testimony of the government. As this court said in reversing the judgment in *Dwinnell v. United States*, 186 Fed. 759:

“However fraudulent the acts of the parties in respect to the relinquishment referred to, they do not constitute the crime *alleged in the indictment.*”

At the docks, it will be remembered, coal was hoisted from the ships into receptacles or bins known as hoppers; from the hoppers it went down a chute into the coal cars; and those cars, by electric traction, were moved on to the platform of the scales and there weighed. It is said by David Powers and his brother Edward, and by the witnesses Waterdoll and Griffin—all of them discharged employes of the company,—that in some instances the coal passing from the hoppers into the cars, would overload the cars, with the result that some of the coal would tumble down into the bunkers below and so escape weighing; that in some cases, there was coal which ran directly from the hoppers into the bunkers below, without being placed on the cars at all, and so escaped weighing; and that some coal was dumped directly from a train of cars into the bunkers below, without being moved on to the scale, and so escaped weighing. But even these witnesses admit, as will appear with more particularity under an independent head of this brief, that the overloading of the cars and consequent tumbling of some of the coal below, was

caused by lumps of coal interfering with the action of the gate by which the flow of coal down the chute from the hoppers to the cars, was controlled; and they say further that the men had no instructions to permit this to happen—this is Waterdoll's testimony—and that he and Griffin, as they both say, did all they could to prevent it. Sass, one of the witnesses, speaks of two instances, years before the indictment, between 1904 and 1906, when some coal ran directly from one of the hoppers into the bunkers; and some of these witnesses say, that on some occasions, coal went directly from the cars into the bunkers. Such a transaction, it will appear, when we come to a more particular consideration of the matter, was not physically possible during the continued and rapid operation, "the merry-go-round", of the cars; and it will further appear that an instance of this dumping of unweighed coal from the cars, alleged to have been done at the noon-hour, is negatived by the uncontradicted testimony to the physical fact that the weighing cars and the hopper chutes were operated by electric current, and that the current was shut off at all times when the discharging of coal was not actually going on.

So much for the passing of coal by the custom-house and into storage without being weighed and settled for. We are stating the matter with sufficient fullness to show the character of the alleged transaction and the line of the government's attempted proof, in respect to what took place at the

dock when coal, in the first instance, was brought into the country. Hereafter, as an independent and wholly distinct head of the argument, we shall consider the subject in detail, and with particularity of reference to the record. But if it could be assumed, for the sake of an argument, that there was a conspiracy to bring on shore, and into the bunkers of the company, imported coal, in evasion of the custom-house weighing and entry, and without paying the duties imposed thereon by law, that would not be a conspiracy for the fraudulent manipulation of the scales, so that they should register a false weight for the coal placed thereon;—it would be a conspiracy to keep the coal off the scales altogether, to bring it on shore without official entry or weighing, and without paying any duties thereon. It would be a conspiracy, not such as this indictment alleges, but to smuggle dutiable coal into the country. If a launch or barge had taken this dumped coal, in the dead of night, from off the importing ship as she lay in the stream, and secretly conveyed it into the bunkers of the company, out of all touch with the scales, the difference would be circumstantial only, not of principle. The case would be one, not of the open and entire introduction into the country of a dutiable commodity, which was then placed upon the scales, and, by some process of tampering therewith, made to reveal a false weight,—it would be the case of a clandestine introduction into the country of unweighed and dutiable goods.

Section 2865, Revised Statutes (3 United States Compiled Stats., 2461, Sec. 5548), comes in at this point:

“If any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, *smuggle, or clandestinely introduce*, into the United States, any goods, wares or merchandise, subject to duty by law, and which should have been invoiced, *without paying or accounting for the duty*, or shall make out or pass, or attempt to pass, through the custom-house, any false, forged or fraudulent invoices, every such person, his, her or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both at the discretion of the court.”

The terms “smuggle” and “clandestinely introduce”, used in this statute, are convertible. The words, “clandestinely introduce”, here as in the common law, are “synonymous with smuggling” (*Keck v. United States*, 172 U. S. 443-4, 455).

“Indeed, in the English statutes the words ‘smuggling’ and ‘clandestine importation’, ‘clandestine running and landing’, were constantly made use of, one for the other, as purely convertible terms, all relating to the actual passing of the goods across the line where the obligation to pay the duty existed, and which passing could not be accomplished except in defiance of the duty which the law imposed.”

Keck v. United States, ubi supra.

The terms employed in the United States statute are

“tantamount to an express adoption of the common law signification”.

Keck v. United States, supra.

Under such statute

“smuggling, or bringing in, or introducing goods, has been held by both the circuit and district courts for this district” [the Massachusetts district is here referred to] “for a long course of years to be proved by evidence of a secret landing of goods, without paying or securing the duty”.

Keck v. United States, supra, pp. 456-7.

When the government case broke down on the alleged conspiracy—the conspiracy for the fraudulent manipulation of the scales so that they should record a false weight of the coal placed thereon,—the government turned, as for the transaction at the docks, to the secret and surreptitious landing of the coal into the bunkers, past the line of the custom-house, without weighing upon the scales, without payment of duty. If there was any substantial evidence of a pre-concert thus to smuggle the coal, to which these defendants were the parties, the criminal partners, that was not the conspiracy described in the indictment and notified to the defendants, and the proof of some other crime will not supply the failure of proof as to the crime charged in the indictment.

“However fraudulent the acts of the parties in respect to the relinquishment (smuggling) referred to, they do not constitute the crime alleged in the indictment”.

Dwinnell v. United States, 186 Fed. 754, 759.

AS TO THE BARGE-HANDS.

We go, now, from the dock hands to the barge hands; from the docks or wharves to the barges. The same conspiracy is described in the indictment, in reference to the barges as in reference to the docks,

“to maintain on the docks, wharves *and barges*”, of the Western Fuel Company, “*scales and weights* which were to be and were *fraudulently manipulated* by the defendants to the end that *said scales should record* the weights of said coal desired by the defendants, and not the true weight *of the coal placed thereon*, and the said defendants did so *manipulate said scales and weights* and the method of *weighing thereon*, so that said *scales and weights* did record the weights of coal desired by said defendants, and not the true weight of the coal so *placed thereon*”.

There is not even an “exposed rod” incident, in respect to the barges; nor a bent link nor a scales-block. There is no showing in this record that the scales maintained on the barges were manipulated as alleged, there is no impeachment anywhere of the weights recorded by the barge scales in respect to a pound of coal placed thereon. The government case, as made by the indictment, broke down from utter weakness, and again, as in the case of the docks, the government sailed away from the indictment and took a new tack. The effort, now, of the government, was to show that the Western Fuel Company had bargained to sell to the Pacific Mail steamships a certain quantity and tonnage of coal, at an agreed price, and that the

Fuel Company, instead of fraudulently manipulating the scales, actually kept back from the scales and retained in its own possession and storage, some of this contract coal, without weighing it at all or delivering it, and nevertheless charged and collected from the steamship company as if the full quantities bargained for had been delivered. It was not a case of coal fraudulently weighed on manipulated scales, it was not a case of weighed coal at all; it was all a matter of unweighed and undelivered coal. And in the sequel, it is said that the Pacific Mail Steamship Company collected draw-backs from the government, not on the actual quantity of coal delivered into and burned by its ships, but, as well, upon the coal which the Fuel Company withheld from the scales and from delivery. The whole thing comes down to an imputation that the Western Fuel Company falsely represented to the steamship company the quantity of coal which had been delivered under the contract of purchase.

This new position of the government is explained by and traceable to a government regulation, made for the handling of rough and bulky commodities like coal. The coal was hoisted in buckets out of the hold of the barge, "tripped" into a chute, and sent down that chute into the bunkers of the steamship. The barge would be equipped, say, with four buckets. The process of filling and loading the buckets was a rapid one. The barge-men would shovel the coal into a bucket,

attach that bucket to the hook of the hoisting cable, and send it on its way; and so with the other buckets. The buckets would rise, be emptied into the chute, and come back for more—it was an endless chain. The men were hard put to it to handle the buckets, to fill and dispatch them, “to meet the hook”, as they came and went. It would be impracticable to weigh each particular bucket before sending it on its course; the time was not to spare, and hence a regulation of the government dispensing the buckets from going upon the scales and being weighed except as to one bucket in fifty. The practice at this port was somewhat less liberal—one bucket in fifteen was placed on the scale.

It is not pretended that as to the bucket which was selected and placed on the barge scales, there was any manipulation of the scales, or false registration of the weight. So far as coal from the barges was concerned, it is not questioned but that the coal was correctly weighed on the scales. The claim set up by the government was, that the other buckets, the ones that never got on the scales at all, were not so well filled—not an astonishing thing when the men were being put to it to meet the hook—as was the selected bucket, filled and weighed while all operations were suspended and the men had time and breathing space. The bills of the Fuel Company to the steamship company, for coal sold and delivered, were made up on the assumption that there was as much coal in the unweighed buckets as in the bucket that was placed on the

scales, and the steamship company acted on that assumption, it has always acted upon it, to this day, it has never impeached the transaction, or imputed any kind of fraud to the Western Fuel Company.

It is a far cry, therefore, from an imputation that *unweighed coal* was delivered on the representation that, bucket for bucket, it was the same in quantity as the coal *that was placed on the scales of the barge*, to an allegation in an indictment, that the government and the steamship company as well, were defrauded by the manipulation of barge scales *so that those scales* should record the weight of the coal desired by the defendants, and not the true weight *of the coal placed thereon*. If, recurring again to *Dwinnell v. United States*, 186 Fed. 759, the Western Fuel Company can be said to have obtained money from the steamship company, in respect to the quantity of coal actually delivered, by false pretenses "they do not constitute the crime alleged in the indictment".

It is not implied, in anything that has been said, that the government's contention of a conspiracy in respect to unweighed coal, is founded in the facts. Under a distinct head of the argument, we shall consider this contention in detail, with particularity of reference, and for the exoneration of these defendants from any fraudulent conspiracy, whether alleged in the indictment or not. But the point now making is, that a specific conspiracy is alleged, described and identified in and by the in-

dictment, that upon this conspiracy the government must stand or fall, and that it cannot prevail on one conspiracy by attempting, ill or well, to prove another.

It will not do to say that this indictment does more than to make the bald charge that these defendants conspired to defraud the United States, and to argue that it alleges a conspiracy to defraud the United States out of import duties and drawbacks, and that all else is matter of unnecessary description, and may be rejected as surplusage. Generic statements, as we have shown from the authorities, will not be tolerated in an indictment; the pleader must be specific, he must descend to particulars. An allegation that the defendants conspired to defraud the United States out of import duties, or out of drawbacks, is a mere conclusion of law, in the mind of the pleader; what might appear to his mind, in his opinion, as a fraud, might equally well wear an innocent complexion in the mind of a court, if it were made aware of the particulars on which he rests his conclusion. He must descend to particulars, as the Supreme Court of the United States said in language that we have quoted from the *Cruikshank* case. There are various ways of defrauding the United States out of revenue, as the authorities quoted by us remark upon, and it is for the pleader to make a specification. So it was, here, that the pleader, evidently fresh from the reading of the *Heike* case, descends

to particulars, and describes the offense as turning upon a combination and agreement

“to maintain on the docks, wharves and barges owned, operated, controlled and occupied by said Western Fuel Company, and by the said defendants, at the port of San Francisco in the State and Northern District of California, *scales and weights* which were to be and were *fraudulently manipulated* by the defendants to the end that *said scales* should record the weights of said coal *desired by the defendants*, and *not the true weights* of the coal placed thereon, and said defendants did so *manipulate* said scales and weights and the method of *weighing thereon*, so that said *scales and weights* did *record* the *weights* of coal desired by said defendants, and *not the true weight* of the coal *so placed thereon*”.

AUTHORITIES AS TO PARTICULARITY OF ALLEGATION.

But even if the nature of the fraud, its specific character, which these defendants are charged with conspiring to commit, has been, as it is not, described with unnecessary particularity, the proof must correspond with the averments, and nothing descriptive of the offense can be rejected as surplusage. This is the settled rule, both in the federal and in the state jurisdictions. In *United States v. Thomas*, 28 Fed. Cas., No. 16,473, the court said:

“Perhaps it might have been suggested, if the question had been at all argued on the part of the United States, that the indictment states that the nutmegs therein mentioned were imported contrary to law, and that so much of the indictment as states in what the illegality of the importation consisted, may be rejected as surplusage. But the short answer to that is,

that this is a part of the description of the offense, and cannot be rejected as surplusage, even if the indictment would have been good if the particular illegality of the importation had not been set forth; for, if an indictment set out the offense with greater particularity than is required, the proof must correspond with the averments, and nothing descriptive of the offense can be rejected as surplusage (citing cases). But it is believed" the court goes on, "that the indictment would have been bad if the allegations of illegality of the importation had been simply that it was contrary to law—without showing *the facts constituting* such illegality, or stating the *particular illegality* intended to be proved."

In *United States v. Howard*, 26 Fed. Cas., No. 15,403, it is said by Mr. Justice Story:

"But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment can ever be rejected as surplusage."

In *United States v. Brown*, 3 McLean 233, the court said:

"If the prosecutor choose to state the offense with greater particularity than is required by the statute, he will be bound by the statement, and must prove it as laid."

An application of this doctrine, the strictness with which it is insisted upon, is furnished by an eminent judge, Mr. Justice Curtis, in *United States against Foye*, 25 Fed. Cas. No. 15,157. Mr. Justice Curtis says:

“But a far more difficult question arises under the other part of the objection. The indictment alleges, not only that this letter was intended to be conveyed by post, but describes where it was to be conveyed; it fixes the *termini* as Georgetown and Ipswich. The allegation is, in substance, that the letter was intended to be conveyed by post from Georgetown to Ipswich. The question is, whether the words, from Georgetown to Ipswich, can be treated as surplusage. It was necessary to allege, that the letter was intended to be conveyed by post. The words, from Georgetown to Ipswich, are descriptive of this intent. They describe, more particularly, that intent which it was necessary to allege. In *United States v. Howard* (Case No. 15,403), Mr. Justice Story lays down the following rule, which we consider to be correct: ‘No allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage’. Apply that rule to this case. It is legally essential to the charge to allege some intent to have the letter conveyed somewhere by post. Suppose the indictment had alleged an intent to have it conveyed between two places where no post-office existed, and over a route where no post-road was established by law. Inasmuch as the court **must** take notice of the laws establishing post-offices and post-roads, the indictment would then have been bad; because this necessary allegation would, on its face, have been false. Words, therefore, which describe the *termini* and the route, and thus show what in particular was intended, do identify the intent, and show it to be such an intent as was capable, in point of law, of existing.

And we are obliged to conclude that they cannot be treated as surplusage, and must be

proved, substantially, as laid. We are of opinion, therefore, that there was a variance between the indictment and the proof; and that, for this cause, a new trial should be granted."

In *Potter v. United States*, 155 U. S. 438, 445, the Supreme Court said:

"It is generally true as claimed that where an indictment is unnecessarily descriptive, even the unnecessary description must be proved as laid."

And the court indicates that the general rule invoked, was not in point, and for the reason that it was not necessary to prove the descriptive matter "otherwise than as it is stated". Said the court, to make the statement complete:

"It is generally true, as claimed that *where an indictment is unnecessarily descriptive, even the unnecessary description must be proved as laid*; but that proposition does not seem to be in point, for it is not claimed that the testimony did not show just such a writing as is charged to have been made by the defendant, and surely it cannot be claimed that *unnecessary matter of description* must be proved *otherwise than as it is stated*."

See also

United States v. Porter, 3 Day, 283, 285-6.

The same rule obtains in the state jurisdictions:

"It is a rule of practice which obtains in criminal as well as civil actions that the allegations upon which the action is founded and the proof adduced must meet and correspond. It is a further rule well settled and established that, where a particular fact or circumstance is alleged as constituting or forming a

part of the descriptive identity of the offense charged, the prosecution is held and limited to that particular state of facts in the proofs adduced to establish the crime; and, further, the court in its charge to the jury is also limited to the matter charged as constituting the offense, and that to submit to the jury in the charge other matters constituting the offense which are not alleged is a radical and fundamental error, which will necessitate a reversal because this court cannot ascertain in such case whether or not the party may not have been convicted on matters not charged against him in the indictment or information. In other words, where the allegation is descriptive of the offense, the guilt of defendant must be found, if at all, upon the ground alleged in the information or indictment."

Randle v. The State, 12 Tex. Cr. App., 251;

Clark v. Commonwealth, 55 Ky., 213, 214;

Commonwealth v. McGowan, 58 Ky., 369, 370;

State v. Newland, 7 Iowa, 242;

- *Helmerking v. Commonwealth*, 37 S. W., 264, 265.

SUMMARY.

Upon the case as made in the court below, and under the settled rules of law, it is now submitted as the clear result, necessitating a reversal of the judgment:

1. The evidence is consistent with the hypothesis that these defendants are not guilty of the conspiracy alleged in the indictment; but more than this—

2. There is no evidence of a conspiracy on the part of these defendants, such as the indictment proceeds upon.

3. The offense must be proved as charged and described in the indictment, and the guilt of defendants, if any guilt there be, must be found, if at all, upon the ground alleged in the indictment.

4. There is no substantial evidence, there is a total failure of proof, of any conspiracy to defraud the United States out of import revenue on coal, or out of draw-backs on coal, by the fraudulent manipulation of the scales, whether at the docks or on the barges, as charged and described in the indictment.

5. The diversion and withholding of imported or draw-back coal from being weighed at all, the dumping of imported coal clandestinely into the bunkers, or the alleged misrepresentation as to the quantity of purchased coal delivered out of the barges, no tampering with the barge scales being shown, does not respond to an alleged conspiracy "to maintain on the docks, wharves and barges, scales and weights which were to be and were fraudulently manipulated by the defendants to the end that said scales should record the weights of said coal desired by the defendants, and not the true weights *of the coal placed thereon*, and the said defendants did so manipulate said scales and weights and the method of *weighing thereon*, so that said scales and weights did record the weights

of coal desired by said defendants, and not the true weight of the coal *so placed thereon*".

6. As matter of law, there being no evidence of the offense alleged and described in the indictment, these defendants are of right entitled to a new trial, and, it is submitted with respect that it is the plain duty of this appellate court to reverse the judgment and remand the cause.

II.

Regardless of the Offense Charged in the Indictment, and With the Full Realization that the Matter Now to be Propounded Lies Outside of Any Question Made by This Record for Decision Here, it Will Nevertheless be Affirmed and Submitted on the Part of These Defendants.

That the evidence is consistent with the innocence of these defendants as alleged parties to a conspiracy to defraud the United States in any manner or at all;

That the evidence is inconsistent with the guilt of these defendants as alleged parties to a conspiracy to defraud the United States in any manner or at all;

That there is no evidence of a conspiracy, in which these defendants were the criminal partners, to smuggle coal into the bunkers, in fraud of the United States revenue, or to misrepresent the quantity of contract coal delivered out of the barges,

in fraud of the Pacific Mail Steamship Company, or to the prejudice of the United States in the matter of the subsequent draw-backs.

Did James B. Smith, F. C. Mills, and E. H. Mayer agree to act together, did they conspire, for the smuggling of imported coal into the bunkers, and unite themselves into a criminal partnership accordingly? We are on the docks, now, when the smuggling of coal into the bunkers is spoken of. There are references to the subject in this testimony:

(1) To coal, lifted from the ship into the hopper or receiving bin, which passed down from the hopper along the chute and through the gate of the chute, into the cars, at times unchecked by the gate, and in quantity to fill the car to overflowing, with the result that the coal would roll off the car into the bunkers below, and escape the custom-house—escape the weighing and escape the duty;

(2) To coal passed, in some instances, from the hopper into the bunkers below, without going upon the cars at all;

(3) To some loaded cars which are said to have been dumped into the bunkers below without being placed upon the scale.

AS TO COAL OVERFLOWING FROM CARS INTO BUNKERS.

First, now, as to coal overflowing from the cars into the bunkers below. The operation of weighing out coal from a ship at the dock is not a leisurely, otiose, or delicate one. It is a rough and

ready proceeding. The government weigher is there in the scales-house, in command of the situation; with him is the tally-clerk of the Fuel Company, checking his weights; with him again, in the case of an Australian or a Japanese cargo, is the ship's clerk, looking out for the interests of his ship, which depend on the outturn or custom-house weight; and in the case of a chartered ship, the representative of the ship is there, too, directly concerned with the outturn weight, for upon that weight his charter rates are calculated. There are no pauses for relaxation, contemplation, or polite conversation—the bulky coal is rushed through the process without loss of time, and the government itself, aware from experience, calls for no fine adjustment of the scale to a level and an equipoise, but permits, by express regulation, the weighing to be done on the rising beam. It would be natural enough that some coal should be spilled below in a situation like this; and upon this circumstance, it is, that the prosecution seized to impute a fraud, and beyond the act of fraud, to impute a conspiracy in which these defendants were partners.

David Powers has this to say as to the overflowing of coal from the cars into the bunkers:

“I used to see coal discharged”,—he is speaking now of the period between 1904 and 1908 (p. 694)—“into coal cars which were afterwards propelled over to the scales. The bottom of the coal cars is shaped like a pyramid or an inverted ‘V’. When they wished to empty the car they pulled a chain which opens the doors on both sides, and the coal drops

down the slanting bottom. I am familiar with the chutes which open out from the bottom of the hoppers, and also with the chutes which protrude from the north side of each hopper. The cars would coal right underneath the hoppers or at the side of the hoppers at Folsom Street—I have seen it both ways. I have seen the cars loading, but I have not been very close to them during the four years from 1904-1908 and when they were loading. The cars used to be overloaded and the coal would roll off and down into the inshore bunkers.”

David Powers, as he says himself, was not very close to these cars during the period, 1904-1908, for he does not remember to have weighed coal there as much as four times, he does not remember the number of the offshore pockets on the Folsom Street dock, he does not know the capacity of the scales (p. 780).

As to the Mission Street dock, speaking now of the period between 1908, when he quit his brief employment with the Pacific Mail, and December, 1911, when the Fuel Company dismissed him, he says:

“The chutes through which the coal runs from hopper to car are operated by the men on the train by pulling a cord which would open the chute cover and let the coal run into the cars. It was a common occurrence to see the chute thus opened and the coal permitted to run down the sides of the car into the bunkers” (p. 703).

He adds that he never saw anything of that kind at Folsom Street during this later period:

"I never, at Folsom Street, saw the chutes open and the coal permitted to run into the bunkers below without being weighed, during these years 1908 to 1911" (p. 703).

David Powers, then, does not go beyond the statement of what was naturally to be expected, that some coal, in the loading of the cars, would spill down the sides and into the bunkers. He gives no explanation of the circumstance, there is an absence even of insinuation. His brother, Edward Powers, a discharged employee (p. 2111), gives this testimony:

"I have seen the coal coming through the chutes of the hoppers into the cars beneath. I never assisted in loading the cars. I have seen some coal drop down from the sides of the cars. Sometimes a lump would lodge itself in the chute, and they could not close the door until they pried that loose, and so naturally the coal ran out, and would continue to run until they closed the door of the chute. In the meantime the coal would run in the bunkers" (p. 868).

Joseph Waterdoll, like the two Powers, a dismissed employee of the Western Fuel Company (pp. 1041-2), is the government's next witness. He had been employed as a motorman to run the four coal cars on the Folsom Street bunkers. Going there in 1905 (p. 1033), and being summarily dismissed in 1910 (pp. 1041-2); his employments since his dismissal have been very infrequent (p. 1041).

Mr. Waterdoll's enlistment in the cause of the prosecution deserves a word. Some two or three

days before he was put on the stand, a couple of government agents went to his house, and without service of any warrant upon him, without any warrant, told him he was under arrest, took him into custody, brought him down town, put him into a hotel—

“they locked me in and put the key in their pockets, I did not know that they were going to lock me in when they took me there, they did not ask my permission” (pp. 1041, 1040).

He was imprisoned in the hotel from 8 o'clock in the evening until 7 o'clock in the morning, and was taken out for his meals

“by the two government officials that grabbed me”, one of whom “always remained with me during the feeding hour, and when I got through he took me back to this building and put me in a room and turned the key, and I remained under lock and key in that room for the greater part of three days” (pp. 1040-41).

Waterdoll says that he frequently loaded the first two cars in his train, personally loaded them, with coal (p. 1035).

“I would stand,” he says, “on the side of the car and catch hold of the lever and turn it, and the weight goes up and the gates come down. When I would want to stop the flow of coal, I would shut off the conveyor. If the hopper gets away from me, she would be liable to bury my car. That is, the weight would take too much of a run on the gate, and she would overflow; you couldn't pull up the gate quick enough. That occurs quite frequently. The coal would then roll off the car and down into the bunkers underneath. If we could help ourselves we did not try to overload the cars.”

And again:

“When a lump of coal got caught in the chute so that you could not close the gate, I always tried to close it as quickly as possible. I did not want the coal to escape in that way, and when it did escape in that way it was entirely unintentional on my part. Nobody ever told me to allow it to escape in that way. I was told not to overload the cars, and I tried to avoid doing so” (p. 1041).

Samuel Griffin, a sort of roustabout (p. 1062), had worked for the Western Fuel Company “off and on, that is, every time a steamer would come in” (p. 1063), during some indefinite period between 1905 and 1910 (p. 1072). He was discharged by the defendant Mayer (p. 1067), and he has no kindly feeling toward Mayer (p. 1071); since his discharge, he has never done a day’s work for anybody (p. 1072), and the deputy marshals and a lawyer for the government found him and got a statement from him at the City and County Hospital, of which he was an inmate (p. 1071). Water-doll and Griffin—*par nobile fratrum*.

Griffin testifies (p. 1065):

“Sometimes the cars would not be full and sometimes they would be overflowing. The overflow would be thrown off and would go down into the bunkers. I could not tell exactly how often I would see that. Sometimes a lump of coal would go into the chutes, and hold the chute open. Then the dumper would have to run upstairs and try to get the lump out. In the meantime the coal would come out, and what would not go down into the bunkers would be thrown in by the men. The coal

would continue to flow into the bunkers until the lump was taken out, that is the fine coal would flow. Sometimes it would take from two to five minutes to do that. That would happen maybe two or three times a day; maybe it would not happen at all."

Again, Griffin tells of the temporary planking, put down whenever a steamer came in, to keep the coal from going into the bunkers.

"I am familiar," he says, "with the framework of those bunkers. *We were supposed to throw coal that fell upon the top of this framework, or upon or near the tracks or cross-beams, into the cars*, but in fact they shoveled it into the bunkers. I never assisted in doing that myself, but I have seen other men do it. I suppose the planks would be placed underneath the hoppers whenever a steamer came in. Sometimes, however, they would not be there. When the temporary planking was in place, sometimes the overflowing coal would fall upon it. As to what became of that coal afterwards, I believe it really would go into the bunkers, but I could not tell. I believe it would go into the bunkers, they would shovel it down there. I have seen that done" (p. 1066).

If Griffin has "seen that done" it is an object lesson of what workmen would do—they pursued the line of least resistance; to shovel the coal from the planking down the bunkers was easier than to throw it back up on the cars. But, as Griffin has testified, "we were supposed to throw coal that fell upon the top of this framework or upon or near the tracks or cross-beams, into the cars; but in fact they shoveled it into the bunkers".

Griffin testifies further:

“The purpose of the movable planks, concerning which I have testified, was to keep the coal that would fall from the cars from going down into the bunkers below. *I have testified that every time a ship came in, those planks were supposed to be put under the hoppers*” (p. 1069).

And again:

“The planking is placed down, I suppose, to save the coal from going into the bunkers. I stated that sometimes *they forget* to put the planking down” (pp. 1069-70).

Again he testifies:

“A lump of coal would get stuck in the chute lots of times,—sometimes once in two days, and sometimes two or three times in one day. Then the coal would fall down on the track and over the third rail. *We could not help it.* We would try, however, not to overload the cars, because we did not want that to happen. It was supposed to be an accident when a lump of coal got down on the track. We always tried not to overload the cars, but sometimes the situation got the best of us. It was supposed to be an accident when that happened. I did not put the lump in the chute so that it would get caught” (pp. 1070-71).

J. T. F. Burns, a laborer, now employed at the custom-house to assist in the opening up and packing of imported merchandise, officially designated as “laborer” (p. 1154), testifies to a single occasion at the Mission Street dock, in 1908. Regan, a customs officer, had been detailed “to cord and seal the trucks on the sides of the coal cars in the night

time so that the cars could not be moved during the night", and in the morning he would break the seals, and at the noon hour he would reseal the cars. "The chutes themselves were also sealed up" (pp. 1158-9). Regan was present at the time and upon the occasion of which Burns speaks, and if there was anything out of the way, he would be aware of it. Burns says:

"I walked down the tracks when I relieved Regan, I was probably two hundred feet from it, and he was explaining to me what I had to do, and I walked down there and I noticed the way the coal was coming out of the chute into the coal cars; the cars would be brought up half way on the chute, and about one-half of the coal would go into the car, and the other half would go down the chute into the bunkers (p. 1159). One car had been filled, the next car had been moved up, and I notified them if they did not move the car up forward I would seal the car up and send for the inspector" (p. 1160).

Burns, who did not know the name of the workman, just knew the man by sight (p. 1160), is asked, with reference to this man:

"Q. What did he do?

A. He moved the car up and loaded the car and called me a son-of-a-b——

Q. What proportion of the coal was going into the car and what proportion of the coal was going down into the bunker?

A. There was a quarter going out of the chute that went down below into the bunker.

Q. Was that the only time that you saw anything of that kind upon the Mission bunker?

A. Yes, that was the only time on the Mission bunker" (p. 1160).

On cross-examination, Burns repeats that the single incident of 1908 was the only occasion on which he was at the bunkers when they were unloading (p. 1160). We may be, we doubtless are, devoting over much time to Mr. Burns, but we think something more of his cross-examination will be of interest. He is inquired of:

“Q. When the coal flowed over the car on the Mission Street bunker in the way you have described, did you report it to anybody?

A. No, sir, I did not.

Q. Didn't you know that there was an assistant weigher there representing the government?

A. Yes, sir.

Q. Why didn't you report it to him?

A. I thought it was his business to see it as well as it was mine.

Q. You thought it was part of his duty to see whether coal did overflow the cars, or not, did you?

A. Yes, sir.

Q. Did you feel that your duty to the government made it proper that you should report that to him?

A. My duty made me feel that it did, but in order to hold my position I knew it was better not to report it.

Q. What did you go there for at that time?

A. Because I was detailed there.

Q. What for?

A. To relieve this man Reagan.

Q. What was his duty there?

A. His duty was to seal that car and see that they came up all right.

Q. To see that they came up all right?

A. Yes, sir.

Q. You went there for the purpose of seeing whether those cars overflowed, did you not?

A. No, sir.

Q. What did you go there for?

A. To see that the cars were put on the chute right, and to see at quitting time that they were properly sealed.

Q. You went there, did you not, to see that all of the coal was weighed,—that was really your purpose was it not?

A. Yes.

Q. You say that having seen that, you did not make a report of it to anybody?

A. I did not make a report of it because it stopped when I ordered it to stop, it didn't go any farther.

Q. Who was your superior officer at that time?

A. A man by the name of Wooster.

Q. Did you report it to him?

A. No, sir, I did not.

Q. Why didn't you report it to him?

A. Because the man was too dishonest to report anything to.

Q. That man Wooster is dead, is he not?

A. Yes, I am sorry to say he is; I wish he was here.

Q. How long was he in the government service?

A. I can't tell you.

Q. When did he die?

A. I guess he is dead pretty near a year, isn't he?

Q. I don't know; I am asking you.

A. I don't know how long he is dead.

Q. Was he in the government service all the time you were in that service, up to the time he died?

A. Yes, sir.

Q. And he had been in the government service a great many years before you were employed by the government?

A. Yes, sir.

Q. And he was your superior officer?

A. Yes, sir.

Q. And he sent you there for the purpose of seeing whether all that coal was weighed?

A. I could not say whether he gave me the details or who gave it to me, but I got it from his office.

Q. And you knew that you were sent there for the purpose of seeing that all the coal was weighed?

A. Yes, sir, I seen that it was all weighed after I got there.

Q. But you didn't make a report that some of it was not weighed?

A. No, sir.

Q. Do you know who the weigher was that was on the dock at that time?

A. I think the weigher on the dock at that time was Nealon. I could not say for sure; think it was Nealon.

Q. And you did not say anything to him about it?

A. I did not.

Q. Did the response that the man made to you on the Mission Street dock when you spoke to him anger you?

A. No, it didn't anger me; that is one thing nobody can do, is to anger me" (pp. 1161-1163).

And finally:

"Q. You have said that you were under Mr. Wooster?

A. Yes.

Q. Was there anyone over you, and between your grade and that of Wooster?

A. Yes, there were assistant weighers.

Q. Who were they?

A. All the men who were assistant weighers down there.

Q. Were you subject to their orders?

A. Yes, sir.

Q. Did you regard all of them as dishonest men?

A. No, sir, I did not, I regarded them as thoroughly honest.

Q. Why didn't you report this to them, what you saw on the barges?

A. Well, they should have their eyes, it is their duty to see it and not mine.

Q. If they were thoroughly honest men why didn't you call their attention to it?

A. Because I didn't propose to be classified as a stool pigeon going around telling every man what he ought to see, when they ought to see it themselves" (pp. 1164-1165).

Enough and too much of Burns. William J. Delaney, whose testimony we have already noticed in speaking of the scales, had been assistant weigher of customs from 1903 to 1905. During 1905 he acted as checker for the Western Fuel Company when coal was being weighed by the custom-house—on some thirty occasions, not consecutive. For the last five years he has been in the revenue service of the government, and is now deputy collector of internal revenue (pp. 1188-9). He says:

"During the time when I was acting as checker for the Western Fuel Company at Folsom Street, I had occasion to observe the manner in which cars were loaded with coal. *Occasionally it would happen that a car would be overloaded, and some of the coal would fall off into the bunkers below*" (p. 1190).

J. F. Barfield now, and for some nine years an assistant weigher in the custom-house, testifies that

between six and nine years ago—during his first three years in the service—

“I once had occasion to go down from the scales house to the floor of the bunker where the tracks are and where the cars run, and I saw an employe of the Western Fuel Company shoveling coal that I was quite sure had not gone over the scales, down into a pocket—he was shoveling coal from the flooring near the car-tracks. That is the only occasion that I can recall where I had any difficulty in regard to that” (pp. 1170-71).

Barfield frequently weighed on the Folsom Street bunkers during his nine years of service (pp. 1171). The coal shoveler that he mentions had just been employed, and he was reprimanded at once by the defendant Mayer, after Barfield had mentioned the matter (p. 1172).

Mr. Freund testifies, as Griffin did, to the coal shovelers pursuing the line of least resistance. He says:

“I have many times, during the time that I have acted as assistant weigher on the Folsom Street bunker, observed coal being shoveled from the framework or runway into the bins below. I complained to the man himself who was doing that, and, another time, I told Mr. Mayer and he went down and scolded the man in my presence. The operation was not afterward repeated that I saw. I did not again see coal shoveled into the bins below on that ship, but I afterward saw them doing that on other ships, but I cannot say how many times. I made several reports in regard to the work to Mr. Wooster” (pp. 1175-1176).

Albert E. Aitken has been a ship's clerk in this port for some 40 years; "in that capacity, I would look after the interests of the ship-owners in the discharge of the cargo" (p. 1186). Prior to 1906—some seven or eight years before he testified—Aitken acted as ship's clerk in connection with the discharge of imported coal by the Western Fuel Company (pp. 1186-1187).

"In the performance of my duties, I would be located right in the scales house. I would frequently take walks along the stringer, however. The bunkers were open on top most of the time until I made a complaint about them. I noticed on such occasions as I walked down the stringer, if the cars were overloaded, the coal would naturally spill off the top and go down in the bunkers below" (p. 1187).

"Sometimes," he says further, "there would only be one or two little pieces, and other times there would be perhaps a bucket-full" (p. 1187).

He made no complaints to the officials of the Western Fuel Company, but did complain to the chief weigher, also to the clerk that was weighing at the time, frequently complained.

"I complained," he testifies, "to the United States weigher about it, and then they fixed temporary planks to put under the hoppers while the ships were being discharged. That was at the Mission Street dock. When the cars thus overflowed, it was because of too much coal coming out of the hopper by reason of a lump getting caught in the chute" (p. 1188).

Joseph H. Desmond, foreman of the Western Fuel Company, was with the Dunsmuirs for five or six years, and he has been with the Western Fuel Company ever since they took the Folsom Street bunkers—on the bunkers altogether nearly fifteen years (p. 1404). He says:

“When a ship comes alongside the bunkers to be discharged of coal it is my duty to see that a tower or hopper is placed opposite each hatch that is working and that the platforms are all down in their proper places. The platforms are placed under the towers to keep the coal from falling down into the bunker below. We have one or two men employed to clean up such coal as does fall down on these platforms and to shovel it up and put it right back into a car. If I am not present so as personally to oversee the placing of the platforms beneath the towers, my men always take care that that is done. I have seen the custom-house officers come down to the dock before seven o’clock in the morning and go down the runway to see if everything is all down and secured under the bunkers there and that there is one platform under each tower. I have also seen the inspectors looking out for that. The inspectors are the men who have charge of all the weighers and go around the steamers and see that everything is all right” (pp. 1405-6).

And again:

“Occasionally, by accident, it will happen that a chute from one of the hoppers will get stuck by a lump of coal, in which case the coal flows down and off the car. It is then liable to break the shoe off the car and stop all operations. I recollect such kinds of accidents. The shoe connects the car with the third rail and

is the appliance by which the power is communicated to the car. Such coal as overflows through this clogging up of the chute is shoveled back into the car" (pp. 1406-7).

Desmond saw to it "that the electricity was going all right" (p. 1409). The operation was by a third rail method.

"The third rail is between the other two rails of the track. If the chutes got clogged, the overflowing coal would fall down on a pitch and go in by the third rail. The side of the car extends a foot or two, more or less, on each side of the track. The coal gets on to the third rail by coming down at both ends of the car" (p. 1412).

Wesley Ewing, machinist's helper, testifies:

"The chutes leading from the hoppers are sometimes blocked by large lumps of coal. When coal falls over the side of the car, it is shoveled back either into the same train or into the next train that comes along. The trains run by a shoe connecting with a third rail, and if coal is allowed to accumulate upon the tracks, the shoe is liable to be interfered with and the train derailed. That happens quite often. A single lump of coal weighing 20 or 25 pounds frequently interferes with the running of the car" (p. 1364).

Again:

"Coal falling over the sides of cars is piled up and shoveled back into them. There are always one or two men stationed on the bunkers for that very purpose, and anybody else there who is not busy assists. That job is usually handed to a new man. He is told to go up and clean out under the hoppers. I have always heard the man or men assigned

to that job instructed to clean up the coal and throw it into the cars. I have never heard any orders given to shovel such coal down into the bunkers, or any orders to that effect. Anybody would know it was not right to throw that coal into the bunkers. I have personally myself, helped to throw the coal back into the cars, and I have seen Eddie Mayer do that also. If the chute from the hopper gets blocked by lumps of coal, the cars get an overload. If they are so overloaded that the coal spills over, the track is blocked and the operations are, of course, delayed" (p. 1365).

Referring to the temporary platforms or planking, Mr. Ewing states that the position of the hopper is adjusted to the hatch of the ship.

"When the hoppers are thus moved from place to place to correspond to the hatches, we pick up the movable platforms and put them in the new positions of the hoppers. That has always been the custom on the bunkers during my employment there. When ships commence to discharge imported coal, the custom-house weigher is always there to see that everything is in place before the discharge begins. To do that he either goes under the towers or along the inshore track. When I refer to a custom-house weigher, or inspector, I mean the general weigher and the man over him" (pp. 1364-5).

Referring again to the man who keeps the platform clear of coal, Mr. Ewing says:

"The extra man who was employed for that purpose generally loads the coal back into the cars when it spills over. He is continually shoveling and cleaning it up. He puts it in

little piles of 100 pounds or 200 pounds, and, as a car comes along, every four or five minutes, he puts it into the car. He is continually engaged in cleaning up and scraping up the coal that falls from the car. He thus manages to keep the platform pretty free" (p. 1370).

And finally, recurring to the matter of planking, he says:

"During the discharge of a vessel, as I have said, the temporary planking is put under the towers or hoppers so as to cover the inshore bunkers. When the hoppers are very far apart, however, as in the case of a very long vessel with her hatches far apart, there are spaces between the hoppers which are not boarded over, otherwise the space is entirely covered" (p. 1376).

The defendant Mayer says:

"I am at present in the employ of the Western Fuel Company and have been for eleven years; prior to that time I was in the employ of John Rosenfeld Sons for eight years, during the first two of which I shoveled coal in the yard, and during the last six of which I was check clerk, in which position I have continued with the Western Fuel Company" (p. 1985).

Mr. Mayer goes on:

"There are platforms down there at Folsom Street to be placed under the towers during the times that the ships are discharging. At the beginning of the discharge of each ship the custom-house officer and myself generally go down underneath the hoppers to see that the boards are properly placed. I do not instruct the men working on top of the bunkers to purposely allow those cars to overflow as the coal comes down from the chutes so that said coal will spill

down; in fact, I have often warned the men not to do that. If the coal gets down on the track and between the cars it is apt to burn out the wires that connect the motor with the car and disconnect the shoe, and put the car completely out of business. That, of course, detains the work. In the unloading of a ship we generally have one or two additional men on the bunkers to clean up the coal that spills on the boards. It is hard to say how many different men I have employed down there during the time that I have worked on the bunker, but I have had at least 250 or 300. I have employed these men to clean up the coal that might spill on the boards and to assist in dumping the cars" (p. 1987).

Incidentally Mr. Mayer speaks of Griffin and Waterdoll. Griffin had never worked for him for more than ten days, and Waterdoll he discharged "because he was drunk and wrecked a train upstairs and delayed the work a whole half day" (p. 1987, p. 1988, pp. 2019-20).

A. J. Schultz, foreman of stevedores for the Western Fuel Company, has been with the company for eight years, and before that he was for eleven years stevedore for the Southern Pacific Company, unloading coal (p. 1337).

He says:

"At Mission Street and Folsom Street bunkers we simply loaded our tubs and hooked them on the hooks and dumped them into the hoppers on top of the bunker. Each hopper had four outlets, of which two were commonly used. I used to warn the men whenever I saw the cars overloaded. I told them I wanted the cars so loaded that no coal would be spilled. It was inevitable, however, that some coal would be

spilled nevertheless. We used movable platforms when we are discharging a ship. Such a platform is placed under a hopper which is in operation. That is done at my direction. I do not recall any instance where my directions in this regard were not carried out. If some coal happened to overflow the cars, as for instance when a chunk of coal would block the chutes leading from the hoppers, we would gather the overflow into a little pile and shovel it into the next car that came along. I had one man and sometimes two men stationed on the bunkers for this express purpose. The gates to the hoppers are operated by air pressure requiring at least 80 pounds. If a lump gets caught in the gate or chute we jump up and remove the lump as quickly as we can" (p. 1338).

Finally, John Thomas Linehan, for five or six years motorman and dumper of coal cars for the Western Fuel Company, testifies:

"We are supposed to load the cars so that no coal will run off. Those are our instructions from Mr. Eddie Mayer. I have heard him give that instruction to other men and myself up there a number of times. He yells the orders out in a loud tone. Sometimes more coal comes into the car than we desire by reason of the jam in the chute, in which case we jump up on top quick and knock out the piece of coal that is clogging the chute so that the door will go up. When the coal overflows the car it falls on the platform or between the rails. I mean the platforms that are underneath the towers. This planking is placed under the towers before we start to discharge a ship. I, myself, and the other men up there put the planking down; that is part of my duty and a part of the duty of every man there before the ship starts. I have seen the custom-house weighers

come down and see that those platforms are in place. I have also seen the government inspectors up there looking after that. The purpose of the platforms is to catch the coal that overflows so that it won't go into the bunker. We have one or two men regularly employed to scrape up such coal as overflows onto the platforms and shovel it back into the cars. That has always been done since I have been there" (pp. 1422-23).

Again:

"If coal overflows the cars and gets down between the rails the train is crippled, the shoe torn off, and maybe the wires are torn off the train too. I have known that to happen. It has happened to my own train. The consequence is that the discharge of the ship is delayed. It stops the work completely. It was about a month or two ago that this accident last happened. On that occasion the wires were torn off my train and the train caught fire and was crippled for three days" (p. 1423).

We have now considered and presented with particularity, tediously no doubt, the evidence in this transcript, to the point and imputation that coal, passing from the hoppers along the chutes into the coal cars, would be manipulated in fraud to overflow the sides of the cars into the bunkers below, in circumvention of the custom-house, without being weighed, without paying duty. There is no evidence, substantial and satisfactory in character, no showing whatever, the showing is overwhelming the other way, that in the overflowing of the coal as it came from the chutes on to the cars, there was any fraudulent purpose or act upon the part

of any employee of the Western Fuel Company. The suggestion of a conspiracy to which James B. Smith and F. C. Mills, along with E. H. Mayer, were parties, so to defraud the United States, is out of all reason, it is fantastic.

**AS TO COAL PASSING DIRECTLY FROM HOPPERS INTO
BUNKERS.**

Second: As to coal passing, in some instances, from the hopper into the bunkers, without going upon the cars.

David Powers says that "several times," he could not say how many, he saw "the chutes underneath the hoppers at Mission Street opened up, so that the coal would run into the bunkers" (p. 697). But these occasions were "at noon or at five o'clock" (p. 696), when work was suspended or the men had quit for the night. At such times, the electricity by which the hoppers are opened, is turned off (p. 1371, pp. 1996-7)—promptly at 12 o'clock, and again at five o'clock, when the whistle blows. Powers does not say that the coal did run into the bunkers, but that he saw the chutes at Mission Street opened up, so that the coal *would run* into the bunkers. He makes no pretense of connecting Mr. James B. Smith or Mr. Mills with that situation, nor even Mr. Mayer. He speaks only of the Mission Street docks. The defendant Mayer went over to the Folsom Street bunkers within a few months, about six months, after the Western Fuel Company took them over (p. 1986),

and that was in July, 1904 (pp. 2165-6). It was between 1902 and 1904, as Powers says, when Mayer was "mainly at Mission Street," that Powers used to go over there and see him (pp. 777-8). And Powers says further:

"During the four years, 1904 to 1908, I never saw coal being dropped directly from the hoppers to the pockets of the inshore bunker at Folsom Street" (p. 695).

And of the succeeding period, 1908 to 1911, he says:

"I never at Folsom Street saw the chutes open and the coal permitted to run into the bunkers below without being weighed, during these years, 1908 to 1911" (p. 703).

Edward Powers testifies to seeing coal coming through the chutes into the cars, some of it dropping down from the sides of the cars, and he explains, as we have already quoted,

"sometimes a lump would lodge itself in the chute, and they could not close the door until they pried that loose, and so naturally the coal ran out, and would continue to run until they closed the door of the chute, in the meantime the coal would run in the bunkers;—" adding immediately, "*I never on any occasion saw coal being discharged from any of those towers (hoppers, p. 868) directly into the bunkers below*" (p. 868).

As to Griffin and Waterdoll, of whom we have already learned something: Griffin mentions one occasion, that of the street-car strike, when the shovellers, "who are supposed to be down there at seven

o'clock, did not arrive until 8 o'clock," when the customs weigher came on also.

"As soon as we would arrive, we would empty the hoppers before the weigher got there. The coal that came out of the hoppers was dumped into the bunkers unweighed" (p. 1065).

Manifestly, no ship was discharging coal into the hoppers before the weigher got there. This is the same witness who says, as we have already noted,

"I suppose the planks would be placed underneath the hoppers whenever a steamer came in" (p. 1066). "The planking is placed down I suppose to save the coal from going into the bunkers" (p. 1069). "I have testified that every time a ship came in those planks were supposed to be put under the hoppers" (p. 1069). "*We were supposed* to throw coal that fell upon the top of this frame work or upon or near the tracks or cross-beams, *into the cars*, but in fact they shoveled it into the bunkers" (p. 1066). "Except that time" (p. 1065-6) referring to the occasion of the strike, Griffin says he "did not receive any instructions or directions from the defendant Mayer at any time in reference to the discharge of coal".

There is not the remotest intimation in respect to Mr. Mills or Mr. James B. Smith. And Water-doll, whose service was somewhat more prolonged than that of the "ten day" man Griffin, nowhere testifies to coal running directly from a hopper into the bunkers, and he says unequivocally that the defendant Mayer never said anything to him upon that subject (p. 1043).

Robert Sass, at one time employed on the barges, and in shoveling and trimming coal for the Fuel Company (pp. 1096-7), an old friend of the Powers family, living in one of their houses (p. 1100), speaks of two remote and vague instances of some coal running from a hopper into the bunkers "after five o'clock". We give his testimony without comment:

"Twice I saw coal running out of the hopper unto the bunkers after five o'clock. The work was all stopped and I was making the barge fast, tying her up for the night, and I heard the noise. It was the coal running that attracted my attention, and I looked up to the bunker and saw the coal running out of the hopper into the bunker. It was coming right out of the hopper into the bunker. I did not see anybody there at the time. I do not know who opened up the chute. I saw one hopper emptied in that way on one night, and the other hopper emptied on the next night. It was so long ago that I cannot fix the dates when that took place " (pp. 1099-1100).

And again:

"On the two occasions, when I saw coal running out of the hopper, I do not know whether the hopper was full or not. I do not know whether sometimes, when a vessel has been coaled, they have to clean out the hoppers. I do not know whether the coal that I saw or heard running out was foreign or domestic coal" (pp. 1101-2).

It would be necessary, of course, to clean out the hoppers, before discharging a new ship. And it would be the duty of the shovelers to throw that

coal from the temporary planking into the coal cars. "I have testified," says Griffin, "that every time a ship came in those planks were supposed to be put under the hoppers." And again, "The planking is placed down, I suppose, to save the coal from going into the bunkers; I stated that sometimes they forget to put the planking down" (pp. 1069-70). And again: "*We were supposed to throw coal that fell from the top of this framework or upon or near the tracks or cross-beams, into the cars, but in fact they shoveled it into the bunkers*" (p. 1066).

Desmond, the foreman, fixes the time of the car-strike as in 1907; during the strike, ships did not commence to discharge until 8 o'clock, a custom-house officer was present at the discharge, and no coal went into the bunkers without being weighed (pp. 1408, 1414).

AS TO COAL DUMPED FROM CARS INTO BUNKERS.

Third, as to coal dumped from loaded cars, without first being weighed:

Once more, we have Griffin and Waterdoll. Griffin says that they

"would *sometimes* load the cars up and then *open the side doors* of the cars, so as to let the coal down into the bunkers below; at that time the cars would be located beneath the hopper. That was done *under Eddie's directions*. No part of that coal was weighed" (p. 1073).

Coal, then, was dropped from an opened and loaded coal car, while that car was still at the

hopper and before it was brought on the scale, and this under Mayer's direction. But Griffin becomes a little more definite:

"I have seen cars unloaded before the coal would be brought upon the scale, that would be done whenever they got a chance to pull the doors open, the motorman would do that under Eddie Mayer's directions" (p. 1066).

The expression, "whenever they got a chance", is the mere opinion or conclusion of Griffin, for he proceeds to say:

"I never pulled them open myself, but saw other men do it; I did not know of the presence of inspectors upon that dock" (p. 1066).

And as to Mayer directing anything of the kind, he goes on to say:

"Eddie Mayer said when there was nobody around 'dump the cars if you get a chance'.—*He made that statement only once.*"

This is the same Griffin, as we have noted, who testifies that

"we were supposed to throw coal that fell upon or near the tracks or cross-beams, into the cars, but in fact they shoveled it into the bunkers" (p. 1066).

His evidence as to the words that he attributes to Mayer, "dump the cars if you get a chance," a remote and single instance, contradicted by Mayer (p. 1992) is neither substantial nor satisfactory evidence.

"In all cases it is the most dangerous species of evidence that can be admitted in a court of

justice and the most liable to abuse. In most cases it is impossible, however honest the witness may be, for him to give the exact words in which the declaration or admission was made. Sometimes even the transposition of the words of a party may give a meaning entirely different from that which was intended to be conveyed. The slightest mistake or failure of recollection may totally alter the effect of the declaration or admission. And more than this, it is most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility, generally, of contradicting it when false”.

Davis v. Davis, 26 Cal. 23, 44;

Mattingley v. Pennie, 105 Cal. 514, 523.

But Waterdoll brings the thing out into fuller light. In the first place, Waterdoll does not pretend that there was any practice or system of this kind, the thing was occasional, not happening very often.

“The cars,” he says, “are discharged by a door with a rope on each side which you pull; that permits the coal to fall down and slide off the cars. I saw those cars being discharged before they went on the scales; *not quite often however*. I received instructions from Mr. Mayer to do that” (p. 1036).

Indeed, the most he can be made to say is, that it was done more than once:

“I received instructions from the defendant Mayer to dump a car into the bunkers before it would reach the scale, I did that, it is pretty hard to say how often, I never kept track of that matter. It was certainly done more than once. I never noticed that done with the other

train—I was too busy taking care of my own train” (pp. 1037-8).

But this is not all from Waterdoll. There is a beam extending underneath the scale house and across the bunker, and if a car has too much coal, the coal will strike the beam, with danger of breaking the scales. Says Waterdoll:

“I know of the beam that lies across the bunker and underneath the scales-house. I have seen that beam come in contact with coal upon the cars. *I would myself* throw off some of the coal so it would not strike the beam, *because otherwise there would be danger of breaking down the scales.* During the time I was working for the Western Fuel Company, the scale was interfered with by reason of that beam coming in contact with the lumps of coal” (p. 1038).

And further:

“We were told both by the custom-house officer and by Eddie Mayer not to load the cars so high that the coal would come in contact with the beam in front of the scales house. *Eddie told me that, and told me that frequently.* If we ran into the beam the scales would break” (p. 1042).

Again:

“If we had an over load on one car, we could not get on the scales with that load on account of a bog beam that lies across, and the danger of breaking down the scales; so that *we would open one side of the car*, and the coal would drop down into the bunkers” (pp. 1036-7).

And finally:

“I used to load from hoppers numbers one and two, and sometimes from numbers three

and four. If my car was overloaded, *I would pull the rope and let half of it go into the bunker below* and then load her up again.

Q. Why would you do that?

A. I did not want to hit the top of the beam and break the scales" (p. 1039).

The foreman, Desmond says:

"If a car goes on those scales so overloaded that the coal would scrape and grind against that beam, the result would be that sometimes the scale would be broken down and sometimes the coal would be thrown off the car. As a matter of fact, I have seen the scales actually break down two or three times from that cause. Even without being ground against the beams at all, the cars are sometimes so fully loaded that their weight is pretty close up to the capacity of the scales. If the car is loaded too high the men trim it off before they get to the scales. If they did not do so the scales might be broken down. For that reason Eddie Mayer two or three times gave orders for the men not to load the cars so heavily. I heard him say that and it was my permanent or standing order all the time" (p. 1405).

And further:

"I have heard Eddie Mayer severely reprimand the men for bringing the cars up to the scales house overloaded" (p. 1406).

And the motorman, Linehan, says:

"I know that there are a couple of beams upon which the scales house rests. Our orders are not to overload the cars so heavily as to strike those beams" (p. 1423).

Mr. Ewing says:

"I remember that there are a couple of large beams upon which the scales house rests at the Folsom Street bunkers" (p. 1363).

A photograph is now shown him, and he continues:

"I see in this photograph what I term a sill for the scales house, which consists of two large beams. The further beam runs clear across the track on which the cars approach the scales. It runs overhead and is over the scale platform itself; in fact, it is right over the scales. Any coal that would be brushed off of a car, as the result of a car being overloaded, would fall upon the scale platform" (p. 1363).

Further:

"I have seen Mr. Mayer hold up cars that came to the scale house so overloaded that the coal would be likely to come in contact with the beam. He would hold the car back until the man leveled the car off so that the coal would not touch the beam; Mr. Mayer always said to be more careful and not overload the car" (p. 1365).

And again:

"I have known the scales on the bunkers to break down by reason of the overloading of the cars. I have several times seen Mr. Mayer stop a car because it was overloaded, and tell the men to smooth the load down on top, so it wouldn't strike the beam" (p. 1372).

And Mr. Mayer has

"had experience in regard to cars loaded to such an extent as that when they came on the scales at the Folsom Street bunkers, the coal

would grind against one of those beams. Shortly after I went to work on Folsom Street, for instance, one of the men came up there with a full load of cars which struck those beams and broke my scale down" (p. 1986). "I have," he says, "often warned the men not to overload those cars" (p. 1987).

The intimation is thrown out by Waterdoll and David Powers, that there were times when a train-load of cars—the four cars used at the bunkers,—would be dumped into the bunkers or pockets without being weighed. Waterdoll, at the close of his direct examination, without any specification of time, or occasion, or circumstances, and without, in the remotest way, connecting Mr. Mills or Mr. James B. Smith, says baldly:

"At the request of Mr. Mayer I discharged *a train-load* of coal into one of the pockets or compartments of the inshore bunkers, without bringing it on the scale" (p. 1039).

Upon cross-examination, he first charges the defendant Mayer with wanting him to open the gate of the hopper, and let the coal run into the inshore bunker, but upon being pressed, he turns a right-about face, contradicts himself as to the hoppers, and attempts to substitute the cars. Here is his cross-examination, he begins by saying:

"When the custom-house inspector was not there I understood that Eddie Mayer wanted me to open the gate of the hopper and let the coal run into the inshore bunker.

Q. You did understand that?

A. Yes, sir.

Q. But notwithstanding that you said on your direct examination *you didn't want to allow these hoppers to become clogged under any circumstances*, did you not?

A. Yes, sir.

Q. Didn't you say that?

A. Yes, sir.

Q. And now you say that Eddie Mayer did want you to open those gates and allow the coal to flow into the inshore bunker?

A. That was when we were *going back*; he would tell you to do that when *going back* to the pockets" (p. 1042).

Attention is called to his explanation about *going back* with the cars to the hoppers. It will be of interest presently. But his explanation does not explain, and he is asked again:

"Q. Now, I will ask you again: did you understand from the instructions given to you by Eddie Mayer, that he wanted you to open the gates to the hoppers and allow the coal to flow into the inshore bunkers without being weighed?

A. He *never said the hoppers*, he said *the cars*.

Q. He did not say the hoppers?

A. No" (p. 1043).

Having first affirmed and then denied the hoppers, and having substituted the cars, we next find Waterdoll "*going back*" with the cars to the pockets. He is asked:

"Q. Then when you said a few moments ago he did want you to open the gates of the hoppers to allow the coal to flow into the inshore bunkers, you were mistaken?

A. No sir, that would be running your car underneath"— underneath, that is, the hop-

pers,—“to load up your cars and go back with them, back to the pockets” (p. 1043).

But to get the cars back to the pockets, “you have” he says, “to go up around the scales house and come down the other way” (p. 1044). It will be remembered that the cars would pass the scales house on one track and go around, beyond the scales, and back upon the other track to the bunkers, returning to the scales track in regular procession, a “merry-go-round”, one train following the other (p. 1366). Waterdoll is asked:

“Q. That is it, you had to pass the scales house and get on to the north track; is that what you mean?

A. Yes sir.

Q. And in doing that you would not get out to the offshore bunkers at all, would you, until you had passed the scales-house?

A. No sir.

Q. So in that operation you would pass the scales twice—that is, you would pass the scales platform on the southerly track and you would pass the scales platform on the northerly track, would you not?

A. Yes sir.

Q. That is corect, is it not?

A. Yes sir.

Q. *And during all of that time the government weigher would be in the scales-house, would he not?*

A. Yes sir.

Q. And those are the occasions under which and in which Eddie Mayer advised you to dump coal without having it weighed?

A. No sir.

Q. Well, what are the occasions then?

A. The occasions are when you are on the inside, when you are getting the coal out of the

hoppers, he would tell you to run a train *back to the pockets* and dump it" (p. 1044).

But again, precisely here, as in the case of the *hoppers*, Waterdoll flatly contradicts himself, for, on his direct examination, he testifies:

"I never received any instructions to run these cars backward from one of the forward *hoppers* and discharge the coal without its being weighed" (p. 1037).

So much for Waterdoll. He neither proves the circumstance against Mayer, nor does he, by the slightest suggestion, connect Mr. Mills or Mr. J. B. Smith. This leaves Mr. David Powers.

In the first place, Powers nowhere testifies that at any time during the operations at the bunkers, whether in the forenoon or in the afternoon, was a train-load of cars run back to the bunkers and dumped without being weighed. What he has to say concerns the bunkers at the noon hour, when operations were suspended and the motive power, the electricity or "juice", was shut off. He had been speaking of the Mission Street chutes being "opened up so that the coal *would* run into the bunkers," an item of his testimony which has been already considered. He saw this "several times" (p. 697). He goes on to speak of "another common occurrence," this also at Mission Street, to dump a loaded car during the noon hour. We call attention, again, as we have done heretofore, to his use, loosely, of the term "common occurrence" as being interchangeable with "several times".

"It was another common occurrence," he says, "at Mission Street, to load up the car when the weigher *had gone to lunch*, pass over the scales with it, and at *five or ten* minutes to one, empty such car into the bunkers, and then load it up again, and have it ready for the weigher *when he came back at one o'clock*. Such carload of coal would not be weighed at all. The defendant Mayer certainly saw these operations to which I have just testified." He adds that "during the four years, 1904 to 1908, the defendant Mills would be upon the docks, but not upon the bunkers, when coal was dumped into the bunkers" (p. 697).

As to Mr. J. B. Smith, he makes no reference whatever.

Powers, now, is speaking of Mission Street. It will be remembered from his testimony, which we have heretofore noted, that, it was between 1902 and 1904, that Mayer, who "certainly saw these operations," was "mainly at Mission Street," where Powers says he used to see him. Between 1904 and 1908, as we have already pointed out, Mayer was the tally-clerk at Folsom Street, and of Folsom Street, Powers says:

"During the four years, 1904 to 1908, I never saw coal being dropped directly from the hoppers to the pockets of the inshore bunker at Folsom Street, nor did I ever during that period see any coal being brought over the scales at a time when the government weigher was not present" (p. 695).

That being the situation at Folsom Street, during the four years from 1904 to 1908, Powers has this to say of the three years from 1908 to 1911:

“A number of times they used to load a car up *just before* the weigher would go to lunch, that is, *a few minutes before 12 o'clock*, and run it over the scales and back again, and switch it back *five minutes to one*, dump it into the bunker, and then *load it up again*, before the weigher returned. That occurred both at Folsom Street and at Mission Street, and was frequent” (p. 703).

This statement, while making no pretense to impute any participation by Mr. Mills or, needless to say, by Mr. J. B. Smith, nevertheless, in and of itself, as to the circumstance indicated, is inherently improbable and grossly untrue. In the first place, for the period 1902-1904, Powers was time-keeper for Mr. Mills, who was taking contracts then to trim coal on outside steamers, and Powers had no call or business to be at either Mission Street dock or Folsom Street dock during working hours, and certainly not during the noon hour when work was suspended, and when Mayer, like the government weigher, had gone to his lunch (p. 686). Between 1904 and 1908, Powers was still time-keeper for Mills, but in addition, was employed by the Fuel Company as track-tender upon the Pacific Mail docks, which were at the end of Brannan Street (p. 686, p. 688). Powers himself says:

“My duties as track-tender during those years, 1904 to 1908, consisted in taking care of the track, and when the engineer was sick, in running the hoist on the barges, and also *occasionally* in acting as assistant weigher to Mr. Mayer in the importation of coal *at the*

Folsom Street dock. I was not employed steadily, but was paid by the day, and I did not work every day. I would be laid off when there was no ship in" (p. 689).

In 1908, Powers, as we have seen, was intermittently employed by the Pacific Mail, some sixty days altogether, and then went back to the Western Fuel Company, "checking, weighing once in a while, attending the hatch on the barges, and running the engine" (p. 699). He was hatch-tender, at intervals, for about a year or a year and a half, but had nothing to do with the loading of the barges from the bunkers; he used to run the barge-engine quite frequently—the hoist engine (p. 699):

"I sometimes acted as assistant to Mayer in loading coal into the barges at Folsom Street after I left the Pacific Mail Steamship Company. This was *only occasionally* to relieve Mr. Mayer when he was at Mission Street" (p. 702).

He was never employed, he had no business, except possibly in this occasional way, at the Mission Street dock, or the Folsom Street dock (p. 780).

The motive power at the bunkers was electricity. The hoppers and chutes from and through which the hoisted coal passed on to the cars, were operated by electricity. The cars were moved from the hoppers along the tracks to a scale platform, on the south track, by electricity, and thence, by the same electricity, they were switched around upon the north track and back to the bunkers where they

were dumped—all the while, the motive power being electricity. That electricity was not controlled at the bunkers at all, but at the power house; it was shut off promptly at noon; it was turned on after the noon hour just before one o'clock, a couple of minutes before; it was shut off again at the close of working hours, at five o'clock. At 12 o'clock, the weigher and the company's tally-clerk, Mr. Mayer, mainly at Folsom Street, like everybody else, went to lunch. The weigher was back at 1 o'clock, Mr. Mayer too, the men at the bunkers as well, to resume operations, and the power was on again to set and keep things going. If there was a loaded car on the track within five minutes of twelve, it was an almost instantaneous process, a matter of a few seconds to weigh it. It is inherently improbable, it is unbelievable, that the government officer would leave it unweighed before the power was shut off at 12 o'clock. And returning as he did at 1 o'clock, to resume operations, and not later than one, it is just as incredible that such a loaded car, a couple of minutes before 1, would be switched over from the south track to the north track, and back upon the north track to the bunkers, and dumped into the bunkers and moved up to the hoppers and re-loaded there, and then moved up to the scale platform to be weighed, when that same car is assumed to have been loaded but unweighed at five minutes to 12, before the power was turned off, and while the government weigher was still on the bunkers. The car would be weighed, if

loaded before 12 o'clock; and if the power went off, as it did, sharply at noon, that car would stand on the track until the current was turned on, and then it would be switched to the north track, taken back to the bunkers, and dumped. No loaded car could be passed over the scales on the south track and returned by the north track to the bunkers, without the electricity; and the electricity was not there when the government weigher left the bunkers, and it stayed off until he came back.

When Powers was asked about the electricity, he was not full of information.

"I do not remember," he says, when the 'juice' goes out of the third rail" (p. 814).

Again:

"I do not know that it is at 12 o'clock sharp that the electricity goes out of the third rail" (p. 814).

Again:

"I do not know that the company generates its own electricity, I think the electricity was furnished by the city, I think they had switches, and that the city furnished the electricity, but I am not sure of it" (p. 814).

Again:

"I do not know that it is a fact that the Western Fuel Company generates its own electricity, and that the electricity goes out at 12 o'clock sharp when the whistle blows" (p. 814).

But this record is not left to depend on the ignorance of Powers.

"The electricity is turned off promptly and accurately at the noon hour. After that there is no electricity on the bunkers until a couple of minutes before 1 o'clock" (p. 1371).

The situation is clearly revealed in the testimony of Mr. Mayer:

"The 'juice' to the Western Fuel Company is supplied by the Power House. We never get power from another company on those bunkers. The switch that controls the 'juice' on the bunkers is in the power house. *We have no switch upstairs*" (p. 2019).

He is asked:

"Q. I wish you would state to the jury what does happen on top of those bunkers with respect to cars that are loaded just before 12 o'clock.

A. The men load up the four cars just before 12 o'clock and they bring them on the scale and weigh them; if they have not got sufficient time to dump those cars before 12 o'clock *they leave them stand on the track*, it is done repeatedly—in fact, it is done almost every day; *at 12 o'clock we go to dinner, and about 5 minutes to one or a few minutes to one* the 'juice' is turned on, *it is off sharply at 12* and is turned on again *a few minutes before one*, and the men leave the cars standing on the tracks, and a few minutes to one,—*it has been weighed by the government, and a few minutes to one they take the cars down and dump them*. That has been done numerous times.

Q. If cars are loaded just a moment or two before 12 o'clock and get down to the scales at 12 o'clock, is it possible to run those cars any longer after 12 o'clock, when the whistle is blown?

A. *No sir. We have got stuck with cars on the scale loaded, the whistle blew and the power goes off.*

The power goes off at 12 o'clock sharp, and comes on a few minutes before 1 o'clock, and then goes off sharp at 5 o'clock again, and after that the plant is dead and the cars could not be operated or the hoppers opened" (pp. 1996-7).

But the "inherent improbability" (*Farley v. Hill*, 150 U. S. 572, 576) of Powers' story as to the noon hour, apart from its contradiction and the explanation of conditions as they really existed, is enough to discredit it with the court. In the case of *The Dauntless*, in the Circuit Court of Appeals for the Ninth Circuit, 129 Fed. 716, 721, this court said:

"This court is not bound to accept the statement of any witness simply because his testimony is uncontradicted, nor even when corroborated by other witnesses, if the story they all tell bears the earmarks of inherent improbability and is unreasonable.

The rule in relation to this subject is well expressed by Mr. Justice Field in delivering the opinion of the court in *Quock Ting v. United States*, 140 U. S. 417, 420, 11 Sup. Ct. 733, 734, 35 L. Ed. 501, as follows:

'Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court, but that rule admits of many exceptions. There may be such an inherent improbability in the statement of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony.'

This court has announced the same rule. *Lee Sing Far v. United States*, 94 Fed. 838, 35 C. C. A. 327, and authorities there cited. See,

also, *Changler v. Town of Attica* (C. C.) 22 Fed. 625, 627, and authorities there cited; *Tracey v. Town of Phelps* (C. C.) 22 Fed. 634; *McLean v. Clark* (C. C.) 31 Fed. 501, 504; *People v. Milner*, 122 Cal. 171, 179, 54 Pac. 833; *Anderson v. Liljengren*, 50 Minn. 3, 52 N. W. 219.

"In *Blankman v. Vallejo*, 15 Cal. 638, 645, the court said:

" 'We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears. A court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him on contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief.' "

We have now examined this record for "substantial evidence" as to the dumping of a train load of cars on the bunkers, whether at Mission Street from 1902 to 1904, or at either Mission or Folsom Street from 1908 to 1911; we find no substantial evidence of the circumstance as such, nor is there so much as an insinuation from Powers to connect Mr. Mills with it, or, if necessary to mention it, Mr. James B. Smith. And for the period from 1904 to 1908, at Folsom Street, where the defendant Mayer was "mainly" occupied, even Powers will not say that anything of the kind ever took place. We hear no more of this circumstance until January 13, 1913, a single, sporadic incident, and for this we have again the testimony of Powers and of one of Tidwell's men, named John W. Smith. The "Americano", a foreign

ship, with her ship's clerk in the scales house along with the government weigher and Mr. Mayer, was discharging at Folsom Street. Powers says:

"In January, 1913, I witnessed the discharging of the 'Americano', with two government officials, at Folsom Street Dock No. 2. The 'Americano' is now sunk, and I don't know whom she belonged to at that time that she was carrying coal for the Western Fuel Company. The government weigher who was present taking the weights was Mr. Phelan. Mr. John W. Smith accompanied me on that occasion, he was a government official" (p. 710).

Powers does not pretend that they went up on the bunkers on this occasion, or ever left the dock.

"We stood around the dock," he says, "from about half past 11 until about half past 1 o'clock. Mr. Phelan went for his lunch *about five minutes to twelve o'clock*, and he returned *a few minutes after 1*. In his absence, Mr. Smith and I observed that at *about five minutes to twelve* four cars were loaded out of the hopper, run up to the scales, *and then* run back again and dumped, without being weighed. *I do not know who had charge of the cars*. The weigher on the dock at that time was Mayer. He *must* have seen the incident that I have mentioned, he was present, *because I saw him come downstairs afterwards*. *After being dumped*, these four cars *were loaded up again under the hopper*, and *when* Mr. Phelan came back from lunch the *new* load of coal was run up to the scales and weighed" (pp. 710-711).

It appears from this, that Mr. Phelan, the government weigher, went for his lunch "about five minutes to twelve o'clock," when the power was on, and that, at this very time at about five min-

utes to twelve, certain operations were begun, proceeded with and completed, during these five minutes to twelve, for it was all "in his absence", namely: "*Four cars were loaded out of the hopper, run up to the scales, and then run back again, and dumped.*" There was no time for such business, even if Phelan left before 12 o'clock, "*about five minutes to twelve o'clock.*" But that is not all, for Powers says further that after being dumped, those four cars moved from the bunkers into which they had been dumped, back again to the hoppers from which they had been loaded, and those four cars were loaded up again under the hopper—"after being dumped, those four cars were loaded up again under the hopper, and *when* Mr. Phelan came back from lunch, the *new* load of coal was run up to the scales and weighed". But the electricity, of which Powers knew so little, had been shut off at the power house at 12 o'clock, and it was impracticable to begin, pursue and consummate these operations, in Phelan's absence, and between the time when he left the bunkers and the time when the current was shut off at the power house. The story is inherently and palpably improbable.

On cross-examination Powers says:

"We took our station on the south side of Folsom No. 2, out of sight of that wharf, *at the end of Harrison Street.* We were on the wharf, right at the bulkhead, over by the dock *on Harrison Street.* That would be the land-

ward end of the dock. We stood behind a kind of shed. No one was with me except Mr. Smith. We remained *there* until a little *after* 12 o'clock, and then we shifted our position to the other side, that is to the north side of Folsom No. 2. We stood behind a place where the *Transport Dock* used to be. We were on *a level with the dock*. Whether the electricity is operating in the third rail during the noon hour, or not, *I do not know*" (pp. 812-813).

He says further:

"I went down to Folsom Street about three times to make such observations during January, 1913. It was always in the day time, I did not go there in the night time. On one such occasion we located ourselves on the top of a roof about a block off. It was the roof of a new building they were putting up on East Street. Mr. John W. Smith was with me on that occasion. Mr. Enlow was also with me on one occasion. Our purpose in going down there was to see the working of the cars, to see what they were doing at noon hours, and to see how they dumped the coal. *The only train that I saw moved during the noon hour* was the one I have mentioned consisting of four cars, in connection with the discharge of the 'Americano' (p. 813).

Again he says:

"I suppose that two or three ships were unloading at the various times that we were down there. In other words, we watched the unloading of two or three different ships. It takes about four days to unload a vessel. We only went down once during the discharge of a single vessel. It might have been a month or two before the discharge of the 'Americano'

if that was in January, 1913, that I first went down there. I have no recollection whether the occasion on which I went down there before the discharge of the 'Americano' was in December, November or October, 1912. I cannot fix the date. The first occasion when I went down there may have been two or three months before the discharge of the 'Americano'; I am not sure. It is a fact that at different times over a period of two or three months, whether there were two or three occasions or more than that, I went down there with those customs agents *for the purpose of secret observation* of the operations of these bunkers. *Outside of the car that I claim to have been moved during the noon hour, during the discharge of the 'Americano', I observed nothing else down there"* (pp. 816-817).

Something more from Powers:

"On those occasions, when I made observations at Folsom Street, I watched the hoppers. I did not see any coal poured out of the hoppers into the bunkers below. We went down there to see if in any way the government was being defrauded, and the complaint of the pouring of coal out of the hoppers directly into the bunkers would be one thing we were looking out for" (p. 814).

And further:

"If they had wanted to put coal in the in-shore bunker during the absence of the customs officer, they could have raised the chute and shoveled the coal down in—it would not have been necessary to put it in the cars at all, they could have let it run from the hoppers" (p. 815).

John W. Smith, one of Tidwell's men (p. 1001), Powers' companion in the "Americano" incident, had been "keeping tab" on the Folsom Street dock for five months, from September, 1912, to February, 1913, with the "Americano" transaction as the solitary result and instance.

"My recollection is," he says, "that the first time I visited the Folsom Street bunkers was in November, 1912; possibly I went as early as September of that year. I went *a great many times* in any event. I went there *when ships were discharging*. I cannot remember the names of any of the ships. I think the 'Dunsmuir' was one though. I cannot remember the number of times I went there *between September, 1912, and the first of February, 1913*.

Q. Is it not a fact, Mr. Smith, that from the 1st of September, 1912, until the 1st of February, 1913, you were keeping tab, so to speak, for the purpose of knowing what ships were discharging at the Folsom Street dock?

A. Well, I don't remember the dates; I only know that *I was keeping track of it*, but I cannot give you the date.

Q. From some time in 1912, which you have heretofore said, as I understood you, to have been probably a month before November, until the 1st of February, 1913, you were making it your business, were you not, to keep track of the ships which discharged coal at the Folsom Street dock?

A. Well, *whenever I was instructed to go there I always went*.

Q. Were you not keeping track so as to advise yourself of the ships that were discharging at that dock during that time?

A. No, *I was not keeping track of it*. (Cf. two answers back.)

Q. But you did *frequently go there* between those periods?

A. Yes sir.

Q. And you always went when a ship was discharging, as I understand you?

A. I cannot say that I always went.

Q. Did you go at times when ships were not discharging?

A. I have been there, but I did not stay there any length of time.

Q. Is it not a fact, Mr. Smith, *that the purpose of your visit was to observe the method and the manner of discharging coal there?*

A. Yes.

Q. That having been the object of your visit there, Mr. Smith, can you not tell us whether or not you did go there when ships were discharging, and whether you went when ships were not discharging?

A. I went *when ships were discharging*; I don't remember of being there very much when they were not" (pp. 1012-1013).

Smith says that on the occasion in question, the government weigher, Mr. Thelen (Phelan) left the dock "shortly after 11:30"; and that the men "appeared to stop work at that time" (p. 1007). Powers, it will be remembered, says that Mr. Phelan "went for his lunch about five minutes to twelve o'clock" (p. 710). If Phelan left at 11:30, and the men stopped work, it could only be because the ship was discharged, and if she had been discharged at 11:30 of January 13th, her discharge would be of record, and Mr. Phelan, a government official, could have been called to prove the fact, and to prove any other relevant circumstance, but

the government failed to call him or to account for the failure.

Smith goes on to say that it was not until

“shortly before twelve o’clock that the cars were thus filled—I could not see very well the discharge of the coal into the cars, I could hear it going into them, however; *after* the cars were *loaded* I could see them and their movement; that is, *I could see the coal* on top of the cars, and see the cars run out past the scales *without stopping*” (p. 1007).

The cars were not switched back to the bunkers and dumped, he makes that later, but were left to the west of the scales, about the middle of the tramway (p. 1007).

Smith was not on the bunker at all that day (p. 1014). He is not good on judging distances, but he was about opposite the other dock (Harrison), it may have been a hundred and fifty feet away, and the bunkers at Folsom Street are about 40 feet high, above the dock level (pp. 1014, 1015, 1016). There is a bulkhead along the sides of the bunkers, “I guess four feet or so” high, “maybe a foot” short of the top of the loaded car—the coal being high enough above the railing to see it, but he “cannot give any notion in feet or inches” (p. 1015). He was 40 or 50 feet westerly from the water, and the scales house, 150 feet away, was on a line with the water (p. 1017). He is unable to state whether there was anyone in the scales house at the time (p. 1019). After Mr. Phelan

left, and before the train of cars moved towards the scales, it was *first loaded* at the hoppers (p. 1019); and this was "*shortly before 12 o'clock* that the cars were thus *filled*" (p. 1007). There is a structure immediately to the south of the scales platform on the southerly track; he could not see through the structure, but "*my recollection* is that I could" see the train load every fraction of the time—"I *don't think* that structure is as wide as the train is long" (p. 1021). The scales platform is immediately in front of this structure (p. 1024), "but I could always see a *portion* of the cars when they were being weighed, I kept in that position" (p. 1024); but he will not be certain even as to this. He is asked:

"Q. I am asking you if at a distance 150 feet, and at an elevation 35 feet more than the ore train was, you still say you could see that ore train for every fraction of a second from the time it started to move until it halted over the street?

A. I could see it from the distance where I was" (p. 1022).

Now, then:

"Q. What *portion* of it could you see?

A. I *think* I could see the top of it all the way; I *am not absolutely certain of that*, I could see the train moving along" (p. 1020).

And according to this witness himself, "it does not take more than a quarter of a minute to weigh a train-load of coal" (p. 1020). Indeed, it is almost instantaneous (pp. 2142-3).

But this is not all from Smith. He testifies:

“After the cars reached the center of the tramway, they remained there until about *ten or fifteen minutes before 1 o'clock; then they were run back again and dumped into the bunkers*” (p. 1008).

We know, now, as one of the incontestable things in the case, that this statement is inherently improbable, that the thing was not physically possible; for, at ten or fifteen minutes before one o'clock, the power had not been turned on at the power house, there was no current at the bunkers, and the cars could not have been run back and dumped. And Smith clinches the falsehood. He goes on to say: “Mr. Thelen was not there during any of this time. I was present when he returned, which was maybe ten minutes or so after the cars were dumped” (p. 1008). But Thelen, or Phelan, got back there at 1 o'clock—that was his hour—and at ten minutes to one there was no electricity at the bunkers to run those cars.

This is the one incident, turning on a quarter of a minute as the maximum time, and under limitations of distance and relative position and obstructions, to which Smith testifies, of which he is not “absolutely certain”, as the result of five months of espionage. He does not mention the defendant Mayer, (Mayer’s testimony, “Americano”, p. 1996) he was not able to say whether there was anybody in the scale house, and there is no pretense that Mr. Mills, not to speak of Mr. James B. Smith, ever

knew or heard of the matter until the trial of the case below.

We have now reviewed with painstaking care, such evidence as there is in the transcript, pointing in any way to the smuggling of imported coal into the bunkers of the Western Fuel Company. We have done this, regardless of the indictment, regardless of the specific conspiracy therein alleged, regardless of the proposition that it does not proceed upon a conspiracy to smuggle. We have done this for the sake and exoneration of these defendants, to put them right with the court, and to advise the court that there is no evidence in this case, worthy the name, of any deliberate wrongdoing—no evidence of any kind good, bad or indifferent, of a conspiracy by these defendants—in respect to the importation of coal at the docks of the Western Fuel Company. It is not strange that Tidwell himself is brought to say “that in your (his) opinion the coal that went into the offshore bunkers was correctly weighed” (p. 550).

TRANSFER OF COAL FROM THE BARGES.

In a similar spirit, and for the same purpose, we go now to the barges—to the imputation of a conspiracy to misrepresent the quantity of coal, actually transferred from the barges to the Pacific Mail steamships, in fraud of the steamship company, with its sequel of draw-backs collected by that company from the government.

A Pacific Mail liner, the "Manchuria", for example, would take on coal at San Francisco before starting on her voyage to Yokohama. This coal would be delivered by transfer from a barge into the hold of the steamer. The barge would get that coal from the pockets or compartments of the off-shore bunkers, say, at Folsom Street dock. The coal that went, from the importing ships, into those bunkers, had been, as we are now aware, first passed over the scales on the dock, and weighed by the custom-house weigher, and then dumped into the bunkers, and from the bunkers, either at the time or later, it was received into the barge (pp. 878, 2102-3). The scale weight of such coal was checked by Mr. Mayer, as the custom-house officer recorded it, and Mr. Mayer reported that weight to Mr. Mills, and Mr. Mills, in his turn, without any hand himself in the transaction, would copy that report into his blotter (pp. 876, 882, 883). Again when the barge had made delivery of the coal into the "Manchuria", the quantity of delivered coal was reported to Mr. Mills by Mr. Park, the representative of the Pacific Mail Steamship Company in charge of the delivery, and Mr. Mills, once more, as in the first instance, would accept that report and copy it into his blotter (p. 883). This is the Mills' book, the blotter.

Now, year in and year out, for eight years, Mr. Mills keeps this blotter, and it appears from the blotter that there was an overage of something less

than 5% in the deliveries out of the barges, 4.88 per cent it is said in one place to be, and finally 4.99 per cent. It was attributable, in large degree, to the method of handling between the barge and the steamship—a method, sanctioned by government regulations, which left most of the coal without being weighed at all, to be estimated on a comparison between unweighed buckets and some occasional buckets that were selected by the custom-house officer for weighing. The government regulation, regardful of the rough commodity and of the expedition with which it had to be handled, was satisfied with approximate results—with the weighing of one bucket in 50; and in the case at bar, it appears that the practice in San Francisco was to weigh one bucket in 15. It was the inevitable human nature of it, that a selected bucket, filled for weighing during the required halt in the operations, would be better filled than the unweighed bucket which the shovelers were hard put to fill in quick succession, in order “to meet the hook”—and the government’s testimony confesses this (pp. 940-941). An explanation is at once afforded of the disparity, under 5%, between the received weight into the barge, set down in the Mills’ blotter, and the quantity of coal, weighed and unweighed, delivered out of the barge, and calculated according to the government regulation. But the prosecution in this case, seized upon that disparity at the trial, and undertook to tag it as a fraud. There was a conspiracy, it was alleged, to which these defend-

ants, Mr. Mayer and Mr. Mills, and Mr. J. B. Smith himself, were said to be parties, to underfill the unweighed buckets, and then pretend to the steamship company, represented all the time by its officer, Mr. Park it was, and incidentally pretend to the government represented all the time by the custom-house weigher who oversaw every bucket and selected the buckets to be weighed, that the underfilled buckets contained as much coal to the pound as the weighed buckets. It is worthy of remark in passing that the Pacific Mail Steamship Company, which stood to lose, by the alleged fraud, something like \$300,000 (p. 497), where the government's loss in draw-backs would have been about \$7000 (p. 491), has never felt called upon—nor, for the matter of that, has the smaller purchaser, the Japanese Steamship Company,—to impute any fraudulent conduct or any false representations to anybody connected with the transaction, or to question its fairness (p. 459). The material thing in the Mills' blotter was the coal that was delivered out of the barge and into the steamship—the coal that was ascertained by the government weigher, who was in charge of the operation, that was checked from the record of the government weigher by the steamship company's representative, Mr. Park, reported by Park to Mills, and copied by Mills into his blotter; for that was the quantity upon which the bills for coal of the Fuel Company were made out, and rendered to the steamship company, and collected

and paid. There was no particular reason for a nice accuracy and a mathematical exactness, in the Mills' blotter, as to the coal that was received into the barge, in the first instance, from the bunkers; for every pound of that coal had already passed the custom-house, and the duty was paid on the custom-house weights. It was upon the coal, as afterwards ascertained by the government weigher, and checked by Mr. Park, when the barge had been towed over to the steamship's side, and had delivered, out of her hold, the coal into the steamship, that the Pacific Mail Steamship Company paid its bills and collected the draw-backs. It was enough for Mills, so far as concerned the coal received by the barges from the bunker, that his blotter kept him sufficiently well posted as to the quantity of coal on this, that, or the other barge, so that he knew what barge he could avail himself of, and how far, when it became necessary to coal a given ship.

To illustrate: the steamship company purchased and used, not lump coal and that alone, but "average" coal, that is to say, coal mixed with screenings; it did so of purpose and advisedly, and it paid less accordingly. Thirty-five per cent of this steam coal was made up of screenings. In thus "averaging" the coal, screenings would be introduced into the bunkers, passing thence into the barges; and as often as six or seven times a year, or more frequently, when

ships were discharging, and it was undesirable to disturb the operation of weighing the discharged coal upon the scales in the usual "merry-go-round", screenings would be conveyed into the bunkers without being weighed. This implied no loss to the government, for those screenings had come from coal previously imported and weighed, and acquitted by payment of its duty, and then, for the first time, screened, and the separated screenings were stored in the screening bin. From this bin, when the occasion arose, they were elevated on a belt to the bunkers, and conveyed into the barge. By the weight of these screenings, the quantity of coal delivered out of the barge later into the steamship would be increased, and would be a part of the overage; but no deduction from the overage on that account would appear in the Mills' blotter, because the screenings had not been weighed, and there was no report, consequently, of their weight for Mills to copy into his blotter.

Again, at times, coal would be taken from the yard over to the bunkers, and there deposited without being weighed, and here, as in the case of the screenings, no account of that coal would be taken in the Mills' blotter.

Again, at times, only part of the coal in one of these pockets would be taken away by a small steam schooner, and the weight would be estimated to the schooner,—it would not be practicable to get that fractional part of the pocket out of the

pocket and up on the track and over to the scales and back to the pocket, and then into the steam schooner—the situation would be no better at the end than at the beginning. As a result, the part of the pocket went from the pocket into the schooner, as through a chute, on an estimated weight. And when the rest of that pocket was taken over by a barge, its weight, as reported to Mills, would be simply estimated, or no account would be taken of it at all (p. 2001).

Again, in analogy to the case instanced of the steam schooner, coal would, on occasion, be taken from one of these pockets and dropped down to the wharf below for sacking and local deliveries, and the weight of what was left in the pocket would be made, if at all, on an estimate.

Again, the weight of all coal that was discharged from a ship, passed over the scales, and then dumped into the pockets, was on a rising beam—this has been repeatedly referred to. But the coal that was delivered out of the barge at the ship's side, was coal sold to a customer, and the barge-delivered coal, as in the case of any customer, and as the fact was in respect to the weighed buckets on the barge, was ascertained on an even beam (p. 1535).

Again, Mills, on a given day, would enter a charge in his blotter against a particular barge, say, of 900 tons, the quantity reported to him; the barge would make delivery of a part of this,

500 tons, to some vessel in the stream. This would leave the barge with 400 tons. She goes back to the bunkers next day, and replenishes with 400 tons more, and Mills, on report to him, charges the 400 tons to the barge, as he had charged the 900. The barge, now with 800 tons in her hold, makes a delivery in the stream of some 600 tons. This leaves the barge with 200 tons. She gets another replenishment, say of 600 tons, Mills again charges it, and she makes another delivery, perhaps, of 700 tons. This leaves her with 100 tons, as a charge against her. But Mills did not continuously carry along these two sets of figures, charges and deliveries, in his limited blotter. In the case supposed, he would total up the charges of 900, 400, and 600, making 1900; and he would total up the deliveries of 500, 600, and 700, making 1800: this would leave a charge against the barge of 100 tons, and Mills would start anew, in his blotter, with the 100 tons as coal received into the barge, dropping all reference to the former receipts. An overage attributed to that barge, on the basis of 100 tons only, as having been received, would be manifestly incorrect, and disregardful of the quantities of coal which the barge had previously taken on. This was a source of error in the blotter, and it led Mr. Tidwell into attributing percentages of overage to particular barges which he felt himself compelled to admit were excessive. For example, Tidwell attributes a 10% overage to the barge "Comanche"

in 1908 (pp. 581-2). He figured this percentage on Mr. Mills' book, as showing the receipt of 1131 tons into the barge, and an overage, on delivery, of 111 tons (p. 582). "We did not figure up all of Mr. Mills' books to see whether he made any errors or not, we simply used his totals" (p. 583). But there was an error in the figuring, and it arose from the circumstance that Mr. Mills, as we have heretofore illustrated, instead of carrying forward his totals, started anew with the balance left in the barge (p. 583). But when Tidwell was asked to say whether the total received by this barge, instead of being 1131 tons was 3666 tons, he said: "I could not answer it at all, because I don't know" (p. 585), (p. 586). Similarly, Tidwell attributed an overage of 22.6 per cent to the "Melrose", one of these barges, as of January-April, 1909 (p. 587), on the basis, taken from the Mills blotter, of some 881 tons as having been received into the barge; whereas in point of fact, as Tidwell admits, when previous totals, which Mills had dropped, are reckoned with, the barge appears to have received, in respect to the deliveries in question, 2400 tons of coal, and Tidwell confesses that his percentage of overrun was incorrect (pp. 587-594, 594). Once more, on a charge made in the Mills blotter to the "Comanche", in 1909, of 750 tons, and a delivery from the barge, taken from the same blotter, of 858 tons, Tidwell attributes to this barge an overage of 14% (p. 594); but when his attention

was called to the dropping of totals by Mills, in respect to coal received into the barge, he admits a total of 2509 tons as having been received, and scales down his percentage of overage from 14.43 per cent to 4.3 per cent (pp. 594-8, 598). Similarly, Tidwell attributes to the "Melrose" an overrun of 24% in 1911, on 878 tons discharged, as against 706 tons received, all from the Mills blotter (pp. 598-9), and upon going back to the dropped totals in the blotter, he admits a receipt into the barge, total receipt, of 3613 tons, with an overage in deliveries of 172 tons; or a scaling down of his attributed percentage from 24% to 4.74% (pp. 598-606, 606, 609). Similarly, in the case of the "Theobald", the percentage comes down from 13% to about 4% (pp. 614-620). And again, in the case of the "Melrose", in 1911, the percentage is brought down from 3.46 per cent, to 1.4 per cent (pp. 620-623). Indeed, there is a reduction of one percentage of overrun from 70% down to 21%. Tidwell says:

"In answer to the question put to me by counsel for the government, I gave the percentage of overages on the barge deliveries. Among those percentages was one of 70 per cent, which I afterward reduced to 21 per cent. The figure 70 per cent was incorrect, in so far as Mr. Mills' books were concerned. My statement was correct; Mr. Mills' books were incorrect in that particular instance. Whether Mr. Mills' books were incorrect in every other case where I gave a percentage, I could not answer. I should say that the total out-turn was incorrect. I did not check up the other percentages which

I have given by going over the records and checking up from the first time a ton of coal was placed in a barge up to the very end, as I did yesterday. There is no other way of getting at the percentage of overage except as shown by the record and by Mr. Mills. I assumed that the figures of Mr. Mills in the books were correct, and I acted accordingly. In the case of the 70 per cent overage I found that these figures were incorrect, and I made the correction. I did not check the figures up in the other cases to find whether they were correct or incorrect'' (pp. 573-574).

Again, while the conditions of delivery out of the barges and into the steamships, regard being had to the circumstance that 56 buckets out of 60 would not be weighed at all, made inherently for an overage, and that would be the normal and the expected thing, as in fact it was, nevertheless these blotters of Mr. Mills for every year of the nine years, 1904-1912, show the existence of underages as well. In 1904, there is an underage in excess of 68 tons; in 1905, in excess of 33 tons; in 1906, in excess of 140 tons; in 1907, in excess of 89 tons; in 1908, in excess of 169 tons; in 1909, in excess of 128 tons; in 1910, in excess of 78 tons; in 1911, in excess of 333 tons, practically 334 tons; and in 1912, in excess of 27 tons (p. 1982). These shortages, or under-runs, or underages, as they are variously termed, were not taken into account by Tidwell in figuring the percentage of overage which he attributed to the barges (pp. 574, 577-8).

The Mills books, then, were mere blotters, liable, however innocently, to mislead in respect to the overages of any particular barge, inexact, and approximate only in expressing the quantity of coal received in the first instance into the barges. If one of these blotters, for instance, charged 1000 tons as received into the barge, and 1050 tons as delivered out of the barge into the "Manchuria", there would be an apparent overage of 50 tons—50 tons more to the steamship than the blotter indicated as being contained in the barge. But if the elements of inexactness in the blotter had been repaired, if omitted quantities, screenings and otherwise had been supplied, if the difference between the rising beam at the dock, and the even beam at the ship's side had been reckoned with, it is clear that the Mills blotter would have shown something more than 1000 tons as having gone into the barge; and the apparent overage of 50 tons would have been diminished by just that something more. Mills, however, as we have suggested, was not specially concerned with precision of statement in his blotter as to the quantity of coal received into the barges; he was satisfied to know, generally, to what extent the barges were furnished to fulfill coaling orders; the custom-house had already passed upon the coal that was received into the barges, whether Mills knew its weight or not, and the custom-house had been settled with;—it was upon the quantity of coal delivered out of the barge, at the ship's side, as ascertained by the customs weigher and by Mr.

Park, that the Western Fuel Company rendered its bills and the Pacific Mail Steamship Company paid them. That was the material thing.

Mr. J. B. Smith speaks to this point:

“Mr. Mills, as well as all the other employees, send reports to my office. I receive reports from every department of the business. From six to eight such reports are turned into my office every day. I do not necessarily look at Mr. Mills’ reports daily. I know that they are there if I wish to refer to them at any time. I have certainly, in looking at them, observed overruns in connection with the barges. The overruns showed upon those reports certainly did not excite any surprise or suspicion in my mind, because, when we first commenced the business of the Western Fuel Company, Mr. Mills explained the method in which they handled the coal in the barge department. I also knew that the weights going into the barges were not accurate. I knew that the barges were merely floating vessels used for the storage of coal and, therefore, we were not particularly interested in keeping accurate weights of the coal laden upon the barges. *All we desired was the approximate weights, because we knew that finally the coal in the barges would find a weight in connection with its discharge.* It could not really have made any particular difference to us whether the coal was weighed at all when it went into the barges. All that coal was the property of the Western Fuel Company. Nobody else had any interest in it. It was not any more important to us to have accurate weights of that coal than it would be to have accurate weights of the coal in a particular bunker or yard belonging to the corporation. *The only thing, therefore, that really indicated the over-*

run to me was the annual stock-taking account" (pp. 2160-1).

Again, he says:

"I never in my life examined the so-called 'Mills' dock books or diaries' covering the years 1906 to 1912. In answer to the question whether it is possible I never looked at those books at all to ascertain the overage or the shortage, or the quantity of coal charged up against a barge, etc., I would say that, as I explained in my direct examination, *we were not interested and I was not interested in the quantity of coal that went into the barges; all that I cared about was the final weight that was charged against the vessels or people that were receiving coal from our barges.* The barges were simply floating store-ships with scales adjusted on them to ascertain *the delivered weight* the same as the platform scales down on the street to ascertain the quantity of coal delivered out from the yard. I suppose I knew Mr. Mills was keeping those books, because they were there on his desk, but I never examined into their contents nor was I interested in their contents. They were his own method of keeping account down there to his own satisfaction. As manager, I was, of course, interested in the manner in which every department was run, but it was not necessary for me to, and I did not, ask Mr. Mills why he made entries in those books. *His purpose, as I understood it, was only to keep a general idea of the amount of floating storage we had so as to be able to know from day to day what position we were in to meet the requirements of steamers calling for coal"* (pp. 2199-2200).

Now, then, when this coal was ascertained and checked by the government weigher and Mr. Park,

they were in command of the situation, not the Western Fuel Company. The government weigher was there to ascertain the quantities of coal in the interest of the draw-back which the government had to pay; Mr. Park was there in the much more considerable interest of the Pacific Mail Steamship Company, to see to it that the steamship company got all that it bargained and paid for. The government regulations, made by the government itself to accommodate the proceedings of the custom-house to the exigencies of a rough commodity quickly handled, called for the actual weighing upon the scales of but one bucket in fifty. At this port, the requirement of the government was exceeded; four buckets in sixty, or one in every fifteen, were weighed. Who picked out the buckets that were to be weighed? The government weigher; and at his side, overlooking the transaction, was Mr. Park for the purchaser of the coal, the steamship company. Is it consistent with a rational view of the transaction, that the government weigher, and, in addition, the steamship company's representative as well, countenanced a delivery of unweighed buckets, so under-filled in comparison with the buckets which they selected for weighing, as to manifest a systematic spoliation of the steamship company, a conspiracy to withhold from it the goods it purchased and was paying for, and, concurrently, to defraud the government of the incidental draw-backs?

What is the testimony, fairly reviewed as to its substantial character, touching the delivery of this coal under the eyes of the government weigher and the steamship representative?

Whether the unweighed buckets had the same quantity of coal in them as the buckets that were actually weighed on the scales, is, for all the witnesses, a matter of comparison and estimate; and, as was to be expected, the estimates are that the weighed buckets, filled during a suspension of operations, and with relative latitude of time, would have somewhat more coal than the unweighed buckets, filled under the stress of rapid hoisting, when the men were hard put to it to "meet the hook". Take David Powers, with whom the government begins its testimony on this point. There were four tubs, he tells us, in the hold of each barge, numbered 1, 2, 3 and 4, hoisted by an engine, and going up in rotation with two men to each tub—going up sometimes as fast as a hundred and twenty tubs an hour, with a net weight to each tub of 1100 or 1120 pounds (p. 688). These tubs, says Powers, speaking of the unweighed tubs, and in terms of estimate, "would go up about three-quarters full, and when they were being weighed they would be heaping full" (p. 688). It was the custom, he says, to take the weight of four buckets at a time, a round of buckets, and this operation would occupy from ten to fifteen minutes. Each tub would be weighed separately, one after the other.

“The difference between the method pursued in taking coal out of the hold when a round of tubs was being weighed, and the method pursued in hoisting the tubs and discharging their contents into the boat, was, that when the buckets were being discharged into the steamer, they were going up *about* $\frac{3}{4}$ full, and there were about 120 tubs an hour, *that is, about two a minute, or 1120 pounds net weight.* I should judge that it took ten or perhaps fifteen minutes to weigh the four tubs, one after the other; when the first tub of a round of tubs was being weighed, *the remaining three tubs would be down in the hold much longer than they would have remained there if weights were not being taken*” (pp. 691-2).

Powers says, again, that when the government weigher wanted a weight, he would tell the defendant Edward J. Smith, who was there for the Western Fuel Company, and Edward J. Smith would call out: “On the scales” (p. 700). This is the defendant, Edward J. Smith, who was acquitted. When Edward J. Smith would thus call for buckets to go on the scales,

“I could see”, David Powers continues, “the tubs of coal before they would be hoisted to the scales when a weight was desired and also the tubs to be hoisted when no weights were being taken. I could also see the shovelers down in the hold of the barge. When the tubs were coming up and being discharged into the steamer without being weighed they were about three-quarters full; but when they were being placed on the scales they would be heaping up, and this would occur in the presence of the defendant, E. J. Smith” (p. 700).

Again, he says:

“The situation at nighttime was much the same as that at daytime with reference to the discrepancy existing between the tubs that were and the tubs that were not weighed upon the barges. Sometimes the coal would come up three or four or five lumps in the tub, at other times the tubs would be *three-quarters full, or a little more full*” (p. 706).

In detailing a visit to the mail steamer “Korea”, on December 18, 1911 (1912), in company with two customs agents, John W. Smith and E. P. Enlow, at a time when Powers had been hired into the government service by Tidwell, a visit of espionage, Powers brings out the circumstance that if the unweighed buckets are not sufficiently filled, they will not trip at the bumper of the hoist, and discharge their contents into the steamship. This visit was made at night—the three visitors were there all night. “When the tubs”, says Powers, “were being weighed, they were overloaded, heaping full, and when they were not weighed, they went up very light”. He then adds, significantly: “Sometimes, indeed, they had to send the tubs back to put *more coal* in them, because they did not contain enough coal *to trip at the bumper*” (p. 709). Edward J. Smith, who was acquitted, is the defendant named by Powers as being present on this occasion.

There was no difference, according to Powers, between the comparative contents of the unweighed buckets and the weighed buckets, in 1902, when the

business belonged to John Rosenfeld Sons, before the Western Fuel Company came into existence—the weighed buckets would be filled up to overflowing,—he never says that they overflowed—while the other buckets were three-quarters full (p. 737). The short of this is, that in the business of transferring coal from barge to steamer, under the circumstances as they existed, a normal disparity between the buckets was to be expected and actually occurred. He says further:

“The checkers’ duties on the barge are to see that the tubs are full, and that they take weights once in every fifteen tubs, or 60 tubs. It is not the checker, but the United States government weigher, who has the authority to say when a tub shall be weighed, and if the tub be filled to overflowing, he has the right and privilege to say, ‘we shall not weigh this’, he can accept or reject any tubs that he pleases” (p. 747-8).

As an agent in the government’s pay, Powers made another visit to the “Korea”, on this occasion in the daytime. “On said latter occasion,” he says, “the buckets were going up fairly well filled, even when they were not being weighed; they seemed to be taking the weights very well in that case.” He refers again to his visit at night to the “Korea”, on which occasion, as we have noted, he had said that the buckets when unweighed, went up “very light”. Referring again to the same occasion, instead of saying “very light”, he says: “very badly”. “On that occasion,” he says, “the tubs were going

up very badly.” But the next sentence gives us something in the way of fact, by which to take the measure of Mr. Powers’ “very light”, or “very badly”; for Powers proceeds to say: “The buckets were only three-quarter filled, *or a little over.*” When the men, then, were working at night, and the tubs “were going up very badly”, those unweighed tubs, on the admission of such a witness as Powers, and at a time when he was spying for hire, were *over* three-quarters full (p. 818).

He adds that when a barge is coaling a ship, there is an inspector, over and above the government weigher—two inspectors, one on each side of the ship, and at times the inspector goes down into the barge itself, and sits there when the barge is coaling the ship (p. 830).

Powers acted as hatch-tender on the barge, 1904-1908, very seldom; and only at intervals for a year or so, between 1908 and 1911 (pp. 739, 699). It was the hatch-tender who would lay off the shovelers, and the reason was because such men were not able to do their work fast enough, “to fill the loads sufficiently” (pp. 839-840). In other words, a man had “to meet the hook”, or he could not hold his job.

Powers nowhere pretends that Mr. Mills instructed him, or anybody else, to tell shovelers to under-fill buckets, and he says that he never told anything of that kind himself to the shovelers while he was working for the Western Fuel Company (p. 834); nor does he in any way connect Mr. Mayer

with the transfer of the coal from the barges. The name of Mr. James B. Smith is not mentioned by him in this connection.

This is the pith and substance of the testimony of David Powers—the David Powers who was willing to do anything if Tidwell gave him a job: “I told him I would do anything, I would be willing to do anything” (p. 845).

Edward Powers had been employed on the barges for several years—up to July, 1907, when he began as assistant to Mr. Mills (p. 860). His testimony goes to his experience on the barges up to the time that he left them to go to Mr. Mills as assistant. Two years of the time was before the fire of 1906, when he acted first as a dumper, tipping the tubs, and occasionally as hatch-tender, getting his orders from the regular hatch-tender (pp. 855, 857). For six and half years after the fire, “I continued to attend to the hatch exclusively upon these barges” (p. 860). The government weigher would be on the barge, either seated there or walking up and down; Powers, in all the time, never saw him in the cabin (p. 859). When particular tubs were weighed, “there would be a sort of cessation in the hoisting” (p. 861). It took from three to five minutes to weigh each tub (p. 861). “The time which the men would have to load the tubs remaining in the hold would be increased by the time which it took to weigh the tubs, which would be considerable” (p. 861).

Powers is asked:

“Q. To what extent, if I may use the expression, were these tubs filled during that period of time when they were put upon the scales to be weighed?

A. They were filled.

Q. You say they were filled; to what extent were they filled?

A. That is the only way I can explain it, they were filled” (p. 861).

He is asked whether the tubs were filled “by being just level with the top, or whether they were filled to overflowing”—the weighed tubs being evidently intended; and he answers: “Sometimes they were filled to overflowing” (p. 861); and he makes the point clear by adding: “sometimes they would put in more when they were weighed:”—(p. 862) it frequently happened. He then gives this testimony:

“Q. During that same period of time to what extent were the tubs ordinarily filled with coal which in fact were not weighed?

A. They were pretty well filled.

Q. You say they were pretty well filled; what do you mean by saying they were pretty well filled?

A. There was not much difference between them and the tubs that were weighed.

Q. You say there was not much difference; what difference was there?

A. There might be a few shovelfuls difference.

Q. Did you ever notice any difference between these tubs more than a few shovels full?

A. Yes, sir, I did.

Q. Upon how many occasions did you notice that?

A. When the customs man made me take it off the top, made me scrape the top off.

Q. How frequently did that occur?

A. Several times.

Q. What has been the situation there with reference to the occasions that occurred during the time you were hatch-tender, when buckets would be filled to overflowing when weighed and not filled when not weighed?

A. They were filled to suit the custom weigher. If he objected they scraped the top off of them and they were told not to do it again.

Q. That is not the question I asked of you. You have testified that the tubs that were weighed were well filled; is it not true that you have frequently during that time that you were hatch-tender seen buckets that were weighed filled to their uttermost and buckets that were not weighed filled to such an extent only that the coal sometimes would not reach the tops of the tubs; is not that true?

A. Once in a great while, yes, sir.

Q. Did not that frequently occur?

A. No, not so that you could not see the top. They were always pretty well filled" (pp. 862-3).

Speaking from his long experience as hatch-tender, Powers does not think it possible "for a person who is on the deck of the barge and removed some distance from the hatch-way, to see the contents of the tubs as they would rise at night" (p. 865). It will be remembered, though not specially important, that part of David Powers' spying on the buckets was at night. Edward Powers goes on to say: "During the time that I was hatch-tender, I did not receive any complaint from the engineers

in the employ of the Pacific Mail Steamship Company regarding the shortage of coal, nor did I hear any complaints made by anyone else"; and he says further:

"During the time that I was acting as assistant to Mr. Mills, from July, 1907, to July, 1911, I frequently saw liners being coaled—frequently saw coal being taken out of barges and discharged into these liners, and frequently saw the operation as the result of which the coal was taken out of the barge and dumped into the liners. I saw weights taken during that period of time. There was no difference, so far as the filling of the tubs was concerned, then, as compared with the method of filling said tubs when I was hatch-tender, *and my evidence would be the same so far as the loading of the tubs was concerned, whether they were weighed or not weighed*" (p. 869).

Powers says that he got quite a few complaints from Pacific Mail engineers regarding shortages of coal, while he was acting as assistant to Mills—between July, 1907, and July, 1911—but he adds that the complaints were not always about shortages, sometimes they had reference to the quality of the coal (p. 869). He continues:

"I would say in answer to these complaints that we were selling the coal by weight, and that the United States custom men were weighing it. When I spoke to the defendant Mills about the matter, he would tell me that the United States custom men were weighing the coal. He gave me the same excuse that I was giving the other men, *and it was a true excuse*. The custom weighers were weighing the coal. In answer to the question whether the defendant

Mills ever suggested to me the propriety of telling the men in the hold that they ought not to put any more coal in the tubs that were weighed than in the tubs that were not weighed, I would say that Mr. Mills told me that the chief engineers were always growling,—that it was part of their job to growl. He asked me if I had any trouble with the weighers, and I said no, that they were weighing the coal, and that they were not kicking. *Mr. Mills told me not to have any trouble over there*" (p. 870).

Special effort was made by the government to have this witness say that Mr. Mills had instructed him to have the shovelers under-fill the tubs that were not weighed on the scales, but the effort failed:

"I have no distinct recollection," says Powers, "of his telling me to suggest to the men in the hold that they should not put any more coal into the tubs that were weighed than in the tubs that were not weighed, but he may have told me that, *I don't remember*, that is a long time ago, he may have told me that, *I have forgotten*" (p. 870).

Powers further says, when asked to compare the character of the weighed coal with that of the unweighed coal, "it is about an average" (p. 871); and as to whether the shovelers filled up the weighed bucket with fine coal—put it into the crevices between the lumps—he says: "Well, it was according to where they were working; if the barge was listed to starboard there may be three tubs on one side taking the list out; if she were upright, they would work it out even" (p. 871). He saw fine coal go into the buckets that were weighed, and this would

add to the weight of the lump coal—he testifies, as a discovery of the obvious, “you certainly could put more fine coal into the bucket” (p. 872).

Powers further says that when he was acting as assistant to Mills, he knew the quantity of coal that went into the barges, and the quantity that went out of the barges “*by the reports that were given to me*”; and he never mentioned to Mr. Mills that the blotter showed more coal out of the barge than went in, he never had any discussion with Mills on the subject (p. 874). There were shortages, on occasion, in deliveries out of the barges, as we have heretofore noted; and Powers, when asked if he had ever discussed the barge overages with Mills, gave this answer: “No, except when he ran short, he made a howl, that is all.” The government proceeded to develop the implications of this “howl”, in the following examination:

“Q. How frequently, how often did the barge run short?

A. Two or three times—to my knowledge, a couple of times—two or three times.

Q. Was that the subject matter of any discussion between yourself and the defendant Mills?

A. No.

Q. Well, you say that the defendant Mills would holler if the barge went short. Did you have any trouble with him from the barge going short?

A. No, he just spoke of it, that is all.

Q. You say he just spoke of it; what did he say?

A. That barge ran short; that is all he said.

Q. Did he make any complaint about it running short?

A. I don't remember whether he did or not.

The COURT. Q. What do you mean by 'howl'?

A. Well, 'The barge is running short; what is the matter.' That is all.

Mr. ROCHE. Q. That is, when a barge did run short, he would say, 'What is the matter'?

A. Yes.

Q. Did he say it in the same tone of voice that you said it, or would he say it in a different tone of voice?

A. He would say it in a moderate tone of voice.

Q. Can you recall anything else, any other language used by the defendant Mills, excepting that, in connection with a shortage when it would occur upon a barge?

A. No, I cannot recall any other.

Q. You can't?

A. No'' (pp. 875-6).

Powers goes into this matter of the tubs on cross-examination, and, explaining the necessity for the shovelers to hook the buckets to the cable in the rapid operation of hoisting, uses the expression, "meeting the hook". He says.

"Q. Now, what do you call that proposition. what is the term for it?

A. For what?

Q. The scientific term, if you can call it such, for this proposition of meeting that cable that comes down?

A. Meeting the hook.

Q. That is called meeting the hook, is it?

A. Yes.

Q. The matter of meeting the hook is something that keeps the men going at full speed,

or at speed all the while, is it, while the buckets are coming up?

A. For instance, the tub is lowered, and the men, they alternate from one side to the other, he unhooks it and throws it over and the other man has to be there to meet it.

Q. But when these buckets are to be weighed, four of them in a round, there is a little more time in the nature of the work in which to fill up these buckets, according to your testimony?

A. There is" (p. 903).

Again, Powers testifies:

"Q. To what do you attribute the fact, Mr. Powers, if it be a fact, that the tubs that are weighed have some more coal in them than the tubs which are not weighed?

A. *Well, I attribute that to the fact that they have more time to put it in"* (p. 911).

And again:

"Q. At all events, Mr. Powers, what is the general state of affairs there at the time the custom-house man calls for a weight with regard to how many of the tubs are then full?

A. There is generally one full.

Q. There is generally one full, and there may be two full.

A. Yes, and there may be three full.

Q. Is it or is it not a fact then, that one or two or even three sometimes of those tubs are in process of being filled when you call down for the man to come up or when the hatch-tender calls down below for the man to come up and this manœuvre is gone through with it with regard to putting the tub upon the scales?

A. Yes.

Q. And while the custom-house weigher is taking that first weight some of those other tubs at least are still in the process of being filled?

A. Yes, sir.

Q. And is that in part what you have reference to when you say that the stevedores then have more time with regard to the filling of the tubs than when they are engaged in meeting the hook?

A. They certainly have more time, certainly.

Q. And if they keep on working throughout that time the natural result of that operation is, in your opinion, that there will be some more coal in those particular tubs as to which they have more time than would have been the case if there had only been the time allowed them on that tub which was necessary to enable the tub to take its turn in the meeting of the hook?

Mr. ROCHE. We object to that question upon the ground that it calls for the conclusion of the witness.

The COURT. That is the same thing that you have proved yourself, *that when they have more time down there they put more coal in*" (pp. 912-914).

A shovelful of coal, says Powers, would be ten or fifteen pounds, and even a single lump added in the weighed bucket, would make some difference (p. 921).

The significance of the testimony of Edward Powers, as we have quoted it, is deepened by the fact, disclosed by his cross-examination, that he was bitterly hostile to the Western Fuel Company, and to Mr. Mills, whom he blamed for "knocking" him to Mr. J. B. Smith, and for putting him out of his job (pp. 955-6). He did not hesitate to use the

epithet "fraudulent" in respect to the stevedores who filled the buckets, although, as we shall show, he recanted his imputation against them. He was asked:

"Q. Now, then, do you mean to be understood as testifying to this court and jury that there was any *wrongful* action *on the part of those stevedores* in the filling of those buckets, or in the loading of those buckets that were hoisted during the discharge of those barges?

A. I do.

Q. And what is it?

A. Well, for the reason the report was rendered F. C. Mills and J. B. Smith every day, stating that the barges had overrun, sometimes as high as ten, twenty and thirty and as high as thirty-five per cent over what was loaded into the barges, therefore it showed *conclusively* that it was *fraudulent*, didn't it?" (p. 924).

Mr. Powers' "conclusions" and his epithet will not supply the place of facts—we remind the court, now, of what we have been at some pains to point out, that the percentages of overage in the Mills blotter, where totals were frequently dropped, are anything but "conclusive", and that Tidwell was repeatedly forced to scale down his percentages; and we remind the court now, and with emphasis, that for all the years, from first to last, that the barges were discharging into the ships, the percentage of overage, nothing being left out of account, beginning, middle and end, was less than five per cent. But Powers, in his next answer, repeats his imputation against the stevedores, and

while he, himself, was acting as hatch-tender. He is asked:

“Q. Do you claim that they were overloaded intentionally and deliberately, by those stevedores?

A. In some cases, yes.

Q. Was that true, Mr. Powers, while you were acting as hatch tender there?

A. It was” (p. 925).

A little later, he recants. He is being inquired of, concerning a conversation with Mr. McCutchen and Mr. Olney and Mr. Moore.

“Q. Do you remember saying down there that when the buckets were going up without a weight being taken, there was about three-quarters of a minute between buckets?

A. I do.

Q. What else do you remember saying in regard to the manner and the method of the loading and weighing and hoisting of the buckets?

A. I stated it took a minute or three-quarters of a minute to discharge a bucket without weighing it, and that it took from three to four minutes to weigh the buckets.

Q. What, if anything, further, did you say in connection with those circumstances, that it took three-quarters of a minute for the buckets when they were going up, and more time when the buckets were to be weighed?

A. You asked me if it benefited the shovelers in the hold, and I told you it did, *that they had more time to fill tubs.*

Q. You said they had more time to fill tubs?

A. I did.

Q. Do you remember having said *anything* else than that?

A. Not that I recollect.

Q. Can you think a moment, and see whether that is all that you said in regard to that subject?

A. I may have said more, *I don't recollect just now.*

Q. Well, don't you remember whether you did, or not, with respect to the filling of these tubs, or the weighing of these tubs, or the loading of them *by the stevedores*, or as to whether or not there was any *wrong* conduct in it?

A. *I don't recollect* that. I told you that when they went on the scales they were overloaded, and when they went up *without being weighed* they were underloaded.

Q. Do you remember saying anything about the human element?

A. *I said it may be human nature to take advantage of anything, for instance, the three or four minutes it took in weighing, and they were there to meet the hook.*

Q. You do remember, do you not, that you said something about human nature, and about meeting the hook?

A. Yes, sir, I do.

Q. Did you forget that a moment ago, when I asked you about it?

A. I am stating that *I remember it now.*

Q. But, I say, when I asked you the question a moment ago, did you forget about it then?

A. *It did not come to my mind; if it did, I would have answered it.*

Q. Well, what, if anything, did you say in regard to the human nature element, and in regard to taking advantage ?

A. *I said the men would shirk the work if they were not forced,—that is to say, if someone was not standing over the hatch telling them to fill the buckets all the time, and if the hatch-tender was not always after them they would not fill the buckets, that is what I told you.*

Q. You remember that, do you?

A. I do.

Q. Do you remember as to whether or not you said there was anything *wrong* done down there?

A. *Not on the part of the shovelers.*

Q. What did you say about that?

A. I said it was only human nature to make the work as light as possible, *speaking of the shovelers in the hold.*

Q. Then speaking of the shovelers in the hold, Mr. Powers, did you use any expression about whether there was anything wrong, did you use that word in regard to that?

A. I may have. *I know* there was *nothing wrong with the shovelers*" (pp. 938-941).

The foregoing examination, we submit as a revealing instance of forcing the truth from an unwilling witness.

And if there was "nothing wrong with the shovelers", it is clear enough that they had not been instructed to do anything wrong. We are not surprised, then, when Powers in his next breath, makes the following admission:

"Q. Do you recall now as to whether anything was said in the course of that conversation with reference to whether or not anybody had ever given any instructions to you or had ever asked you to do anything wrong?

A. You asked me—one of the gentlemen asked me,—*if J. B. Smith ever told me to overload tubs or underload tubs*, and they asked me *the same question about Mills*, that question was asked.

Q. And what did you say?

A. *I said I received no instructions from them to overload or underload tubs*" (pp. 941-2).

And yet, Mr. Mills—not to speak of Mr. James B. Smith—was indicted by the grand jury on the testimony of Tidwell as the only witness.

Powers speaks again of Mills. In his direct examination by the government's counsel, Powers says:

"In answer to the question whether the defendant Mills ever suggested to me the propriety of telling the men in the hold that they ought not to put any more coal in the tubs that were weighed than in the tubs that were not weighed, I would say that Mr. Mills told me that the chief engineers were always growling, that it was part of their job to growl. He asked me if I had any trouble with the weighers, and I said no, that they were weighing the coal, and that they were not kicking. *Mr. Mills told me not to have any trouble over there*" (p. 970).

On cross-examination Powers again refers to Mills:

"Q. Now, so far as their putting more coal in these buckets is concerned, the stevedores putting more coal into buckets is concerned, at the time the weights are called for, than at other times, *have you ever told the stevedores to do anything of that kind?*

A. I have not.

Q. *Has anybody ever asked you at any time, Mr. Powers, while you were in the employ of the Western Fuel Company, while you were a hatchtender, or while you were an assistant superintendent, has anybody ever asked you or*

instructed you *to tell the stevedores to do anything of that kind*, that is to say, to put more coal into the buckets when a weight was to be taken than when they were going up without weight being taken?

A. Not that I remember of.

Q. Not that you remember of?

A. No.

Q. Don't you think that if anybody had ever said anything of that kind to you, that you would recall it?

A. I think so.

Q. *And do you remember now of any occasion as long as you were connected with that company when anything of that kind was ever said to you?*

A. *I was never told to tell them to underload the tubs, no.*

Q. Were you ever told to tell them to overload the tubs at any time when a weight was to be taken?

A. I was never told to.

Q. Is it not a fact, Mr. Powers, that Mr. Mills used to say, whenever any of these matters would come up, or complaints come up, that he did not want any trouble over there, or not to have any trouble over there?

A. He would say not to have any trouble over there—yes, he said that" (pp. 907-908).

And in respect to one of the hatch-tenders, Dan Pallas, Powers says that several customs-weighers made complaint to him as to overloading the tubs (pp. 908-910). Powers, before reporting the matter to Mr. Mills, told Pallas not to have any trouble with the weigher (p. 910); meaning "to keep the tubs filled when going on the scales as when they were not being weighed" (p. 910). This was some

three or four years ago (p. 909). Powers reported the complaint to Mr. Mills, who, in the presence of the custom-house weigher, instructed the hatch-tender and Powers also, "to keep the tubs even" (p. 908).

And again:

"Q. Do you remember, more than once, Mr. Mills saying he did not want any trouble over there, or with the customs-weighers, or whatever it was he did say?

A. Whenever the customs-weighers started in kicking, or started in objecting to the way they were loading the tubs, and I told Mr. Mills about it, *he would tell me not to have any trouble over there*" (p. 915).

He says further:

"Q. You were assistant superintendent, Mr. Powers, for a matter of four years; do you recall how often you reported things like that to Mr. Mills and *he would say to you he did not want any trouble over there*?

A. *Quite a few times*; I do not remember the exact number of times.

Q. I know—and you could not be expected to remember the exact number of times, but do you remember whether or not Mr. Mills has said that half a dozen different times?

A. *He said that quite often*, and he also said that the weighers were cranky, and they had something or there was something the matter with the weighers; he made that remark, he said they would kick at anything.

Q. Well, whether they were cranky, or not, or they would kick at anything, or not, he used to say he did not want to have any trouble over there?

A. He said that several times, yes, sir.

Q. Do you know whether he said it half a dozen times?

A. I don't remember whether he said it half a dozen times or whether he said it 12 times or three times.

Q. You cannot remember?

A. I cannot remember, no.

Q. And when you would report these matters to him, he would say that, would he not?

A. He said that several times when I reported the matter to him, yes, sir.

Q. Whether the customs-weighers were cranky, or not, they had the absolute right, as you understood it, to say how that weighing should be proceeded with, did they not?

A. So I understood, yes, sir.

Q. And is it or is it not the fact that whatever the customs-weighers said with regard to weighing, the employees were supposed to comply with it?

A. *They were supposed not to have any trouble with them.*

Q. *And if a custom-house weigher claimed that he would not take a certain bucket or tub for weighing, it had to go on up into the ship without being weighed, did it not?*

A. Yes, sir.

Q. And if a custom-house weigher claimed that certain other buckets represented more of an average of the buckets that were coming up *they would be weighed instead of the ones that had first been offered, would they not?*

A. They would" (pp. 915-917).

These complaints, as Powers says, were made to him in the first instance, and by him reported to Mills; for Powers, it was, who was in close touch with the barges, Mr. Mills visiting them only on occasion, perhaps twice during the day:

“I would go out to the mail dock,” says Powers, “or in the stream, or wherever the barges might be working, more often than Mr. Mills; Mr. Mills was there twice a day, or sometimes more, I was a regular or steady hatch-tender, working upon different barges” (p. 923).

Powers volunteers an incidental remark about Mills, which has a significance not appreciated, probably, by Powers when he made it. He refers, without any circumstance or detail of time or transport, to some occasion “on the transport dock—Mr. Mills told me to underload the tubs; on the transport dock, *not on the Pacific Mail dock*” (p. 925). This is all we hear of the incident or of the statement.

The overage attributed by government exhibits 125 and 130, as deduced from the books, was, in the case of the transports, and covering the 9 years 1904-1912, relatively little—some 1528 tons, as against 29,362 tons, attributed to the mail liners as draw-back ships (pp. 2812, 2866). The government confined its efforts at the trial to the mail steamships; not a single operation as to the transports was gone into. But the significance of Powers’ statement is just here—that if Mills had been a party to a conspiracy to defraud the Pacific Mail, and incidentally, out of draw-backs, to defraud the government, he would never have limited a suggestion of underloading to the comparatively negligible instance of the transports, in exclusion

of the Pacific Mail Company's steamships. The significance of this incidental and fugitive remark of Powers cannot be discounted.

Now, as to Mr. J. B. Smith. We have already quoted the testimony of Powers, that Mr. Smith never gave him any instructions to underload or overload tubs. He has just this as to Mr. Smith: "*I think*", he says, that he reported one complaint to Mr. Smith, made by an engineer of the "Manchuria" named Bunker; but does not say whether it was as to quantity or as to quality; and, "*as far as I can remember*", he told Mr. Smith that Bunker was kicking, and "*I believe*" Mr. Smith said that Bunker was always kicking, or something like that.

"I never", says Powers, "had any conversation with defendant James B. Smith about how it happened that the Pacific Mail steamships permitted these shortages to exist" (p. 887).

As to the defendant Mayer: He had nothing to do with the barges, that was not his business.

"I don't remember", says Powers, "any conversation with the defendant Mayer about these overages on the barges, or the alleged discrepancy existing between the in-take weight and the out-turn weight" (pp. 887-8).

A word or two more, and we have done with Edward Powers. His explanation of what caused the overages in the transfer of coal from the barges to the steamships is two-fold and is entirely reasonable: First, the overages were due to the system adopted, pursuant to the government regulation, for the

transfer of coal from the barge to the ship; second, they were due, also, to the increased weight of the coal, from the absorption of moisture, in the course of transfer, if not, as well, prior thereto. Under the government regulation, accommodated as a practical matter to the exigencies of the case, only four out of sixty of the buckets that went up on the hoist were weighed on the scales; the other 56 buckets were never weighed. It is now clear, no one explains it any better than Powers in testimony that we have quoted, that the four weighed buckets would, to an extent—at least, as Powers says, to the extent of a couple of shovelfuls or more—contain in coal a quantity in excess of what was contained in the unweighed buckets. With apologies for any repetition, we quote from Powers:

“To what do you attribute the fact, Mr. Powers, if it be a fact, that the tubs that are weighed have some more coal in them than the tubs which are not weighed?

A. Well, I attribute that to the fact that they have more time to put it in” (p. 911).

Such a system, it is evident, going largely upon mere estimate, must necessarily be inexact; but the commodity considered, the handling of such a commodity, and the pressure for dispatch in the coal-ing of ships, no system could obtain or endure which was over-nice or too exacting. It may have been a poor system, if mathematical precision was the ideal, but it was practical and practicable. When

Powers was asked about his conversation with Mr. McCutchen, Mr. Olney and Mr. Moore, he said:

“Q. Mr. Powers, have you now related all of that conversation?

A. There may be more, but not that I recollect of.

Q. Can you not think for a moment, and see in your own mind whether or not in fact there was more?

A. I stated there may be more.

Q. Do you recollect, now, any more?

A. I have stated I do not.

Q. Do you remember saying anything in regard to this system of weighing, as a system of weighing?

A. Yes, sir, I did.

Q. Did you not remember that until I recalled it to you?

A. I did not; if I did, I would have answered it.

Q. What, if anything, did you say in that regard?

A. *I told you it was a very poor system, and that that was partly responsible—partially responsible—for these overages*” (p. 943).

He was then pressed, for several questions and answers, to state whether the use of the term partially—partially responsible—was not a later interpolation of his; whether he had not laid the whole responsibility on the system. He says that he *believes* he used the word part or partial—“I believe I did.” He says that this part of the conversation had gone out of his mind until it was just suggested to him by counsel, and now it has come back into his mind. And when asked whether he was now

able to say “positively and unequivocally” that this word “part” or “partial” or some such word, was really used by him, he does not answer positively and unequivocally. He says, “I am *pretty sure* it was”; and he gives as a reason that “otherwise I would be very foolish to give the statement to you that 35 per cent overage was on account of that.” We have said enough about such a percentage as 35 per cent, derived from the Mills blotter, and we need not repeat that the actual percentage on the whole nine years was less than 5 per cent. Nor does Powers pretend that he made any reference to 35 per cent in this conversation—he says he did not (pp. 943-4). Once more he is asked, “Do you positively recall, so that there can be no mistake about it in your mind, that in connection with this system of weighing, and the responsibility for the overages, you used the word ‘part’ or ‘partial’, or some word similar in meaning?” His answer is anything but positive—“I *believe* I did,” is what he says (p. 944). And again he says: “I said that that was partly responsible, *and that was very true*” (p. 945).

Again, Mr. Olney put some questions to him:

“MR. OLNEY. Q. Mr. Powers, referring to this occasion when you came into the office of McCutchen, Olney & Willard and there met Mr. Moore, Mr. McCutchen and myself, I will ask you if you did not have this conversation with us and if I did not say to you, ‘Mr. Powers, we want to know the truth about this matter’?”

A. You asked me concerning the barges.

Q. I will repeat the conversation to you, and then I want an answer, yes or no, from you in regard to it: If I did not open the conversation by saying to you, 'Mr. Powers, we want to know what the truth is about this matter; is there anything wrong or was there anything wrong down there in connection with the loading of the vessels, or anything that you know about down there on the waterfront?'—and did you not say, 'Yes, there is something wrong'; and did we not then ask you what was it which was wrong, and did you not then reply to us *that the thing which was wrong was that the buckets were heavier loaded when they were weighed than when they were not weighed?*

A. I stated that *that was partly responsible.*

Q. And did we not ask you in response to that statement how that came about and how it was done, and did you not then say to us, didn't you go into an explanation and say to us, among other things, or say to us primarily as the explanation that the buckets when they were not being weighed came up at the rate of less than one minute and that when they were weighed it would take three or four minutes to weigh them or to weigh one, and that the men in the hold were being driven all the time to meet the hook, as you phrased it—

A. (Interrupting.) At times.

Q. (Continuing.) And that it was all they could do to load the buckets when they were going up fast in order to meet the hook?

A. At times, I said.

Q. And that when the weighing took place they had more time and they loaded the buckets heavier in that manner; and did we not ask you if that was done intentionally and you said, 'No, it is simply an incident of the business'; and did we not ask you in that connection, were any instructions given or was there any under-

standing that the buckets which were to be weighed were to be weighed heavier, and did you not answer, no; and did you not also, in response to that question, say, 'It is simply the human element of these men trying to meet the hook'; and did we not then say to you, 'Why, there is nothing fraudulent or wrong about that'; and did you not say, 'No, that was simply the human element'; and did we not then ask you, 'Was there anything else wrong down there that you saw,' and did you not say, 'No, there was not'; and did we not then ask you, 'Were any instructions issued,' or in the course of the conversation did we not ask you if any instructions were issued by Mr. Mills or by anybody else, or was there any understanding in regard to this matter, or in regard to anything wrong down there, and did you not say, 'No'?

A. *Part of that is true.*

Q. And part is not true?

A. And part is not true.

Q. Will you *pick out the parts that are not true?*

A. I said the system was *partially responsible*; I did not tell you that *I had not received any instructions from Mr. Mills.*

Q. You did not?

A. No.

Q. And you limited your answer to the fact that the system was only *partially responsible?*

A. I did.

Q. *Is there anything else in the conversation that is untrue?*

A. *That is all I remember*" (pp. 950-952).

Second, as to moisture, that also contributed. Powers is asked, "In view of the services which you rendered on behalf of the Western Fuel Com-

pany, and the knowledge that you acquired during the time that you were hatch-tender, and during the time you were assistant to the superintendent, Mills, what knowledge have you upon the subject as to the cause of this overage?" And he answers: "Moisture helped a little" (p. 881). The examination proceeds:

"Q. You say moisture helped a little?

A. Yes.

Q. What kind of moisture?

A. Moisture out of a hose.

Q. Oh, moisture out of a hose?

A. Yes.

Q. Was that Spring Valley moisture?

A. No, salt water.

Q. To what extent was this salt water moisture responsible for the overage?

A. Well, they turned the hose in, and, I guess, that added a little to the weight.

The Chinese crew on the steamers would play the water upon the coal on the barge *sometimes for three or four hours*. I stopped that practice once or twice. The practice was an occasional one" (p. 881).

He goes on, in the next sentence, to unite, to these conditions of moisture, the "system" employed in transferring the coal, as a concurrent and preponderating cause: "It would frequently happen," he says, "that coal would be discharged from the barge into the vessel without any salt water being upon it at all, and that, notwithstanding that fact, there would be an overage. I also thought that the method of weighing, that is to say, the custom of having some tubs go on the scales a little heavier than the

others, might be responsible for the overage. *It is true* that the "overage, or a *large part* of it (recall here his expression, 'partly responsible'), was due to the fact that there was more coal in the tubs which were weighed than there was in the tubs which in fact were not weighed" (pp. 881-2). Read this in connection with what he also says:

"Q. To what do you attribute the fact, Mr. Powers, if it be a fact, that the tubs that are weighed have some more coal in them than the tubs which are not weighed?

A. Well, I attribute that to the fact that they had more time to put it in" (p. 911).

We now leave Edward Powers, noticing, briefly, however, a circumstance as to which the government counsel questioned him on direct examination. The Fuel Company, and we are speaking from this examination of Powers, had a storage ship, the "Algoa", which lay in the stream, with coal in storage, for a year or a year and a half (p. 891). Her coal was finally discharged, in varying quantities (p. 890). The hatchways were closed, when she was not discharging, and at one time or another

"the coal became heated, the coal was not actually burned, however; there was no evidence of that. The coal at the top, at the time of the discharge of the 'Algoa', was dry, but underneath it was moist where the coal was heating. The upper part of the cargo, however, contained less moisture than when the ship had been loaded. The cargo was discharged into the barges; the coal was ultimately discharged from the barges into steamers" (pp. 890-891).

Powers, who was assistant superintendent at the time (p. 888), says that the coal was discharged into the barges according to this average "system", and that he directed "that it be correctly weighed" (pp. 892-3).

The various discharges of coal are now gone into by reference to the entries in the Mills blotter, some of the entries therein having been made by Powers himself, and the figures therein were sent by him, Powers, to Mr. Mills (p. 893, pp. 891-2, p. 898). David Powers, not Edward Powers, says that when the "Algoa's" coal heated, some pipe was stuck down in the coal, but no water was used at the time because, so he says, Mr. Mills thought the salt water, fresh water not being available, would take the strength out of the coal; and David Powers gives his opinion that "there must have been a shrinkage in the weight of the cargo due to the fire," but he does not know how much it was (pp. 705-6).

Professor Parr, who was competent to give an opinion, testifies:

"Q. Let me put a specific case to you: Take the case of a vessel that was loaded with coal in, say, January, and the coal was kept under hatches for a year and half, and during that time heated—at the end of that time it was found to have heated, and it was then discharged; within what limits would you expect a change in weight, an addition in weight to that coal, by reason of oxidation? This Australian coal, by the way, that you are dealing with?

A. I would say that the amount of oxidation would in all probability range somewhere between 2 and 4 or possibly 5 per cent. Those would be the extremes, I would say" (p. 1615).

Edward Powers, it is true, says that not all of this "Algoa" coal was in oxidation—"the coal at the top, at the time of the discharge of the 'Algoa' was dry," he says, "but underneath it was moist, where the coal was heating," and the result of it all is, as stated by government counsel, that the out-turn weight of the "Algoa" was, neglecting mere pounds, 8535 tons, with an overage of 116 tons in excess of the in-turn weight, which was 8419 tons (pp. 890, 899): or one and thirty-seven hundredths per cent.

We have now considered with fullness and particularity the testimony of the two Powers respecting the transfer of coal from the barges into the ships. It is the testimony of the two main witnesses for the government. It is the testimony of two discharged employes, one of them a convicted smuggler, an informer, and a hired spy; the other, bitterly hostile to the defendants, especially to Mr. Mills, and from whom, as we have shown again and again, the truth had to be dragged. None the less, to any open mind, coming to the consideration of their testimony, it cannot but appear therefrom that, so far from any conspiracy to defraud the steamships being made to appear, it is put beyond a reasonable doubt that the overages in delivery were due to the system of transferring the coal, and, to an extent, to the moisture to which it was

subjected; that there was no plan or scheme, there were no instructions, to defraud in the process of transfer; and that any disparity between the weights into the barges and the weights out of the barges was inherent in the process itself, incidental to it, and in the human nature of the men actually engaged in that process. So far as any accusation against Mr. Mills, not to speak of Mr. James B. Smith, or of Mr. Mayer, is sought to be rested on the operations of delivery from barge to ship, the case here, without another word of explanation, may be confidently submitted on the testimony of the two Powers.

Three ex-shovelers, who had worked at one time or another in the barges, were rounded up by David Powers—Philip Ganesi (pp. 1113-1116), Jim Balestra (pp. 1121, 1124) and Tony Belish (p. 1138). They were put on to show that the men shoveled more coal into the weighed buckets than into the unweighed buckets,—including the hatch-tender. Their testimony does not relate to any of the defendants. Ganesi speaks of a hatch-tender who would say:

“You fill them up pretty good when they are going on the scales, and when they are not going on the scales he don’t care”;

and Ganesi says

“The tubs that were being weighed contained more coal than those that were not weighed” (pp. 1107-8).

Ganesi was asked:

“Q. Now, you say that when a weight was to be taken, fine coal was put into the bucket?

A. Yes.

Q. What kind of coal do you claim was put in the bucket when a weight was not to be taken?

A. Anything, rock, full or not full, meeting the hook, and turning her loose, and letting her go.

Q. You would meet the hook, turn her loose, and let her go?

A. Yes.

Q. When the weight was to be taken, you would put in fine coal, would you?

A. Yes, and give plenty of chance to fill them up.

Q. You had plenty of chance to fill them up, too?

A. Yes.

Q. That was because the four buckets were to be weighed in succession, was it?

A. Yes.

Q. And you had more time then to put in the coal in the buckets than you did when they were going up at other times?

A. Yes.

Q. And so, when you had plenty of time to fill the buckets, you used to put in all fine coal, did you?

A. Yes, the heaviest there was on the barge.

Q. When you were having to meet the hook, would you put in whatever kind of coal that was handiest for you to get in the bucket?

A. Yes, to get in the tub” (pp. 1111-1112).

Jim Balestra says:

“I never got any direct order to overload tubs from anybody, with the exception of one

hatch-tender by the name of Rooker, who would give us a wink at the time when it was time for the custom officer to take a weight, and we knew the balance" (p. 1119).

The "balance" was, that when weights were taken "we would go to work and put on as much coal as we could possibly put on all of the tubs, and when we did not have to take weights we would put it on any old way, we would always leave the tubs *not quite full*" (p. 1119).

Balestra says, further:

"Most of the time the custom-house officers used to complain that the tubs were overloaded when weights were to be taken; some of them, however, did not complain; when a custom-house officer would complain, we, as a rule, would have to take some of the coal off the tub (p. 1119).

Balestra adds the embellishment that on occasion "if we had a chance to do so," he would step on the rope of the tub and make the scales weigh heavier, but "we could not do that very often"; nor does he pretend that even the hatch-tender Rooker ever gave him any order to do that.

But, like everybody else, Balestra has to confess the fact. He says:

"We work under pretty high pressure when the weighings are not being made; it is just about all we can do to fill the tubs and meet the hook" (p. 1123).

And he very much qualifies the statement that the weighed tubs were in all cases filled with fine coal (pp. 1126-7-8-9, 1132-3); and he adds:

“I quite often saw the custom-house weigher direct that a part of the tub-load of coal be removed before a weight was taken, that was a common occurrence” (p. 1134).

Tony Belish, the last of the trio, says:

“They would fill them up good, you know, load them; they would put a little more coal in the tubs when they go on the scales. I have done that myself. The hatch-tender gave me a sign to that effect; he would say, ‘this fellow is going on the scale,’ and would make a sign which everybody knows who has worked down there five or six years.”

The hatch-tenders “made trouble when the light tubs went on the scales.” This is the first intimation that light tubs went on the scale. And the hatch-tenders would say, according to Belish, “Why don’t you give me a heavy tub on the scales?” (pp. 1137-1138). This sign he speaks of he explains a little more fully:

“Q. Was there one tub loaded immediately under the hatch at the time a whistle was blown for a weight?

A. One tub right in the hatch full.

Q. Would the men take some fine coal and go over and fill that tub, then, in the presence of the custom-house weigher?

A. When the custom-house officer was weighing, they can’t put it in, they can’t have any chance.

Q. That tub would have to go up just as it was?

A. Yes.

Q. Now the only sign you had, or only signal you had that tubs were to go on the scales, was either a whistle, or the hatch-tender would say, 'the tub is to go on the scale'?

A. Yes.

Q. That was the only sign you had, was it not?

A. Well, sometimes he gave me a sign like that. (Illustrating.)

Q. A sign like that?

A. Yes.

Q. That is to say, *before* you knew the tubs were to go on the scales?

A. Sure" (p. 1140).

He goes on to say, however, that the hatch-tender said, all the time, "on the scales".

"Q. Did you ever hear the hatch-tender say, 'on the scales'?

A. Yes, all the time.

Q. He said that all the time, that they were to go on the scales?

A. The hatch-tender, yes.

Q. On every occasion, isn't that correct?

A. I don't know what you ask me.

Q. Now, I will put it to you slowly, and see if you do not understand: "Whenever the hatch-tender wanted the tub to go on the scales he said out loud, didn't he, 'On the scales'?

A. Yes, he sung out, 'On the scales'.

Q. And then all the men knew the tubs were to go on the scales, didn't they?

A. Yes.

Q. And that was the sign or signal that you had, was it not?

A. Yes, but as I told you, there was one tub in the hatch, and the hatch-tender says, 'You fellows come up,' and there was three tubs

in the pile, and you put more coal in those three tubs" (pp. 1141-1142).

Tony, like Jim Balestra and Ganesi, confesses the fact. He testifies:

"Q. How long did it take to load a tub when you were hoisting rapidly?

A. To load one tub?

Q. Yes.

A. Well, it took about a minute, a minute and a half.

Q. About a minute and a half?

A. Yes.

Q. Did you work *very rapidly, very fast*?

A. Sure, *have to do it*.

Q. *Have to work very fast*?

A. *Yes*.

Q. Did you always work with a shovel, or did you scoop it up?

A. Sometimes *scoop it up* and sometimes with a shovel.

Q. When you can, you scoop it up?

A. *I scooped it lots of times*.

Q. When you cannot scoop it up, you put it in with a shovel?

A. Yes" (p. 1143).

He adds that sometimes they weighed every fifteen minutes (p. 1143), and when asked if he was quite certain about that he says:

"Well, I know, because some custom-house weighers took them every ten or fifteen minutes, as Bill Hubbard worked about six years ago, by Jesus, he took fifteen tubs one after the other" (p. 1144).

The government also called Robert Sass, whose testimony we have noticed on another matter, and

Frank McKenna, neither of whom, any more than the three shovelers, pretends to connect any of these defendants with the overloading or underloading of tubs, or to have had any instructions from anybody on the subject. Sass says that the weighed tubs were filled up, almost always with fine coal, the unweighed tubs, the majority of them, were "very slight"—he does not explain this term—and there were even times when "the tubs that were not weighed would contain as much coal as when weighed on the barges" (pp. 1098-1099). He says further:

"It is my understanding that the custom-house weigher has the say as to whether or not every bucket shall be weighed or not weighed. If a bucket is too light, he might order it up and refuse to weigh it; or he may brush some of the coal off, or have some of the coal brushed off, because the bucket was overloaded" (pp. 1102-3).

And further:

"I cannot give you any idea as to how often it had been that I saw the custom-house weighers insist upon coal being brushed off the bucket before they would allow it to be weighed" (p. 1103).

Again:

"When the custom-house weighers ordered the men to brush off some of the coal from the tubs before they would allow them to be weighed, the tubs were filled up *above their sides*" (p. 1104).

The other government witness, Frank McKenna, now employed at Payne's Bolt Works, had worked for the Western Fuel Company on the barges both before and after the earthquake—"up to as late as two and a half years ago" (p. 1165). He testifies:

"Q. When the hatch-tender would sing out 'two men come up, *tub on scales*', where would the first tub be that was afterwards to be weighed?

A. The first tub would not be hoisted yet. It is after the last tub lands that he says 'two men come up', and then they would hook on a tub and come up and weigh it. There was no loss of time.

Q. You understand what is meant by meet-the hook, do you not?

A. Yes, sir.

Q. Would this signal be given by the hatch-tender before the hook would be met?

A. Well, as soon as the tub was landed. Then those men would shove their tub in and then they would come up and those other fellows would fill that tub and they would weigh a round of tubs—three.

Q. What, if anything, did you notice as to the quantity of coal in tubs that were weighed as compared with those that were not weighed?

A. Well, on account of weighing them, *and they had so much time there*, and they could fill them *a little fuller*.

Q. Irrespective of what they could do, Mr. McKenna, what was the practice as observed by you?

A. Well, *the men were worked so hard to meet the hook that the tub would not come as full according to my mind as I could see it as it would be when it came on the scales*

because then they were not worked to death and sweated to death'' (pp. 1166-7).

He says further:

“Mr. ROCHE. Q. Did the tubs which were weighed contain more coal so far as quantity was concerned than the tubs that were not weighed?

A. Well, as I explained before, the men would have a little *more time* below and they would naturally *scrape up and shovel in the scrapings and everything* and that would *naturally be a little more coal at times* than at previous other times. Then again, they would probably put big lumps in at times to block the hole *so as to have a little rest*, and then *they would have to get crowbars to open up the hole*.

Q. Can you describe the appearance of the coal in the tubs, whether it was below the sides of the tub or above the sides of the tub, or how?

A. Sometimes there would be lumps, and at other times *finishing up the barge* there would be *screenings like*, and naturally the *screenings* in my eyes would weigh *more than the lumps*, than the heaviest part of the big lumps.

Q. Let me direct your attention to the tubs that were being weighed during the period of eight months prior to the fire; just describe to the jury how the tubs would appear so far as the quantity of coal was concerned, whether the coal would be above or below the sides of the tubs?

A. Well, I should judge, just as I said before, that the tubs coming up *to me apparently they looked a little bit heavier when they went on the scales than they did otherwise* because naturally looking at them more on the scales perhaps made me think so” (pp. 1167-8).

McKenna goes on to say that he worked for the Western Fuel Company, on and off, for about six and a half years after the fire, his last work being two and a half years ago, on the Pacific Mail Liner "Korea". "I had the same opportunity for observation as before the fire" (p. 1168). His examination proceeds:

"Q. What was the practice pursued by the Western Fuel Company after the fire with reference to putting coal in tubs which were weighed as compared with the quantity of coal placed in tubs which were not weighed; in other words, would your testimony be the same?

A. Well, I will explain that myself now in a second. Just as I say, when the tub would be on the scale we would naturally take more notice to it because then the tubs are coming up, it is just, *'there she goes' and you dump it, and down she goes again.* When I went on the scale we would naturally take notice—not that it concerned us in the least, but we just may have looked down to see the fellows pulling them on the scale. It was about the same.

Q. Was the same procedure followed, so far as the signal was concerned that was given by the hatch-tender?

A. It is just as I said—he would say 'on the scales,' 'two men come up' and they would land their tub and come up to help pull the tub on the scales.

Q. The two men would come up before the tub was hoisted from the hold?

A. Oh, yes, there would be no delay, they would go up immediately.

Q. And how many minutes would be occupied in weighing a round of four tubs, when four tubs were weighed?

A. A round of four tubs would not take more than 6 minutes.

Q. 6 minutes to weigh a round of tubs?

A. Maybe 7 minutes for four tubs. It was according to the barge's list; sometimes they would miss the rope and would have to pull a little heavier or a little harder.

Mr. ROCHE. Q. Would you, upon occasions, see the quantity of coal that was contained in the tubs which were not weighed?

A. *Oh, I have seen tubs coming up there with lumps sticking up a foot or more*" (pp. 1168-1170).

The hatch-tender, called, in the testimony of the shovelers, "Rooker", and said to be a Mexican (p. 1135), was Andrew Rocca. He was first a coal shoveler with the Fuel Company for some five years, before that he had been a steamship fireman for five or six years, and for the last three years or so he has been the hatch-tender for the Western Fuel Company (p. 1333). When he was coal shoveler neither of the two Powers told him to overload or underload buckets, indeed, their instructions were "to keep the tubs even as much as I could" (p. 1333). Now were there any instructions to go into the fine coal when weights were to be taken, and to use lump coal when there was no weighing (p. 1333); similarly with the other hatch-tenders (pp. 1333-4); when Rocca became hatch-tender himself, his own direction to the shovelers and practice was to keep the tubs evenly full (pp. 1333-4). The custom-house weigher would sometimes complain about tubs coming up full "with a little cone on

top, and he would order that tub up without being weighed" (p. 1335). "The custom-house officer would not stand for an over-filled tub" (p. 1335). On a few occasions when Rocca was shoveler, and also when he was hatch-tender, the custom-house officer would say: "Here, you shall not weigh that tub because the tub is more than full, the coal is heaping up above the top of the tub" (p. 1336). Such tubs would be sent up without being weighed (p. 1336).

The other hatch-tender, Frank Wilson, has held that job with the Fuel Company for the last ten years (p. 1325). It is the hatch-tender who employs the shovelers—"I employ the gang or crew that does the shoveling of coal on the barges" (p. 1325). He explains:

"The instructions that I give to the shovelers are that the buckets are to be kept even at all times. I never have given instructions to the men to overload the buckets when weights are to be taken and to underload them when weights are not to be taken. I have not given instructions to men to go into the fine coal or mix the fine with the lumps when weights are to be taken. When I say that when the tubs are filled they go on to the scales whether they contain fine or lump coal, I mean that when the custom-house officer orders us to take weights I have to put the tub on the scales whether it contains lump or fine coal. When a barge is loaded, the fine coal is amidships; that is, in the center, and the lump coal is in the wings. When weights are called for, the shovelers put in whatever coal happens to be in immediate proximity to the then location of the buckets.

In other words, they fill the tubs with whatever coal may be handiest. I do not know when the customs-house officer is going to take weights" (pp. 1325-6).

And again:

"I have no way of telling when a custom-house officer is going to call for a weight. When he does say that he wants a round of weights I have to give the engineer a signal that the tubs are going on the scales. I give this signal by hollering out on all the barges except two; on those I use a whistle. *In addition to the custom-house officer, the weigher or tally clerk for the Pacific Mail Steamship Company is present when we are loading the liners of that company.* His name is Park. Sometimes Mr. Ed. Smith is also present, but the majority of the time he is not. We try to keep the tubs that are not weighed, as well as the tubs that are weighed, even. If a tub comes up that is not even we jog the men's memory and tell them to keep the tubs filled" (p. 1327).

Further:

"It has always been the rule to keep the tubs even, I believe Mr. Mills first gave me instructions to that effect about ten years ago" (p. 1328).

They were both working for Rosenfeld Sons at the time. Mills gave him the same instructions when they went to the Western Fuel Company: "He told me to keep the tubs always even, and to have no trouble with the customs-weigher" (p. 1329). As to Mr. J. B. Smith, "I have never spoken to Mr. Smith in my life" (p. 1329).

And again:

"I remember distinctly that Mr. Mills told me not to have trouble with the customs-weighers, and I never did have any with them that I know of" (p. 1329).

Wilson, like Edward Powers, tells of the moisture in the barge coal.

"In the winter time," he says, "or after rains, the coal is pretty wet. The men's feet get wet from working in it. In the summer-time the boatswain of the steamer, while washing the deck down, is accustomed to play the hose on the coal in order to lay the dust so as to avoid dirtying the steamer. He uses a five-inch hose. The foreman of the bunkers of the steamer also puts water on the coal in the summer-time so that the dust will not choke the men who are working in the bunkers. The water is put on the coal while it is still in the barge because if the coal is dry and dusty and goes into the bunkers that way there is no chance for the dust to escape. On the big steamers where the chutes into the bunkers are high the coal may drop 60 or 70 feet into the bunkers, but in most cases the drop is not so far. This matter of wetting the coal down during the summer months is of frequent occurrence. The trimmers would refuse to work if the coal were not wetted down. The trimmers are the men who stow the coal in the bunkers of the vessel" (pp. 1331-2).

And again:

"The water was discharged on the coal in the summer time between six and seven o'clock in the morning, when they were washing the decks down. The custom-house weigher would

be present at the time, I have seen him there on such occasions. They play the water on the coal may be fifteen or twenty minutes at a time" (p. 1332).

Again:

"The coal is also wetted down in winter time if it happens to be dusty, they are not putting water on the coal now because rain is so plentiful. I have, myself, at times, been in the bunkers of the ship; the men do not play the water on the coal after it has got in the bunkers, that is always done on the barge. I would protest to the Pacific Mail Steamship Company playing the hose on the coal if they kept it up too long, for the simple reason that the water would run through the coal and come out on the skin of the barge, and then the men would get their feet wet" (pp. 1332-3).

Arthur Mullan, who had been general foreman, and later, superintendent for the Pacific Coal Company, prior to that, general foreman of the Black Diamond Coal Company—a continuous experience in San Francisco as general foreman of over thirty years,—went with the Western Fuel Company as general foreman, and has held that place, since October, 1911 (p. 1313). In that capacity,

"I have charge of the coal barges and of the stevedores and hatch-tenders" (p. 1313). "The hatch-tenders' duties are to hire the gang of men that shovel. I have nothing whatever to do with that matter. I do not suppose I am personally acquainted with more than five or six men who are working on barges" (p. 1314).

And as to the importation of coal, he says:

“I have no charge or supervision whatever over the stevedores who are employed about the bunkers in the unloading and discharging of vessels bringing imported coal into the port of San Francisco—those men, I believe, are under the supervision of Mr. Schultz” (p. 1314).

Mr. Mullan has

“at times observed the custom-house weigher taking weights at the Pacific Mail Docks, I have observed that they weigh four tubs at a time, the tubs that are weighed and the tubs that are not weighed are kept as even as possible, according to my observation” (pp. 1314-15).

He has never given instructions to the hatch-tenders to overload or underload tubs, or to mix fine coal with lump coal in some tubs, and fill others with lump coal, nor has anybody, to his knowledge, given instructions of that kind to the hatch-tenders.

“When a particular barge is to coal a vessel, I communicate with the hatch-tender to get his gang of men to go to work on the barge; as to what men he shall get, I make no suggestions, that is entirely his province” (p. 1315).

His instructions to the hatch-tenders to keep the tubs evenly filled (p. 1316) were verbal, not written (p. 1316), they were general instructions, not referred to any particular barge (pp. 1316-17).

“It was not because I had noticed they were overloading the tubs that I told them to load the tubs evenly; it was because the tubs were

going up fast, and one of the tubs seemed not to be as full as it ought to be—that is why I told them to fill the tubs evenly. When I first took charge there, I notified the hatch-tenders to be careful and have the tubs filled evenly. At that time Mr. Mills took me to the barges, and told me to see that the tubs were kept evenly filled” (pp. 1317-18).

He says again:

“I never gave instructions to the men who were shoveling below in the hold of a barge; my jurisdiction did not extend to them, they were under the hatch-tender’s control” (p. 1320).

The fatuity of any attempt to connect Mr. Mills with a conspiracy to defraud the Pacific Mail Steamship Company, or incidentally the government, by instructed and systematic disparity in the shoveling of the coal, as between the weighed and the unweighed buckets, ought to be apparent enough. As Mr. Mills himself says:

“Such instructions as I give to the foreman of the barges or to anyone connected with the barges, are to the effect that the buckets shall always be kept even. I have never told anyone, either foreman, hatch-tenders, or stevedores, that the buckets were to be loaded to overflowing when weighed and were to be underloaded or loaded only half to three-quarters full when they are not weighed. It is not true that even on a single occasion I ever told Edward Powers that I wanted *any* buckets either underloaded or overloaded” (p. 2099).

And again:

“I have nothing whatever to do with the selection of the individual stevedores who shall compose the various crews; my acquaintance with the stevedores is very limited.”

And he adds, as might be anticipated:

“that during the nine or ten years in which the Western Fuel Company has been engaged in business, hundreds and hundreds of different men have been employed as stevedores” (p. 2099).

Arthur O’Leary, a coal trimmer in this harbor for seventeen or eighteen years, foreman trimmer for the Pacific Mail for 6 or 7 years, and foreman trimmer for the Western Fuel Company under Mr. Mullen for two years (p. 2085) testifies much along the same line as Edward Powers and Frank Wilson in respect to moisture in the barge coal. He says:

“With reference to the coaling of the Pacific Mail boats, I would say that it is our practice to wet down the coal in the barges when it is dry and dusty. We use an ordinary fire hose for that purpose. Sometimes we wet the coal down twice or three or four times a day, according to its condition. The reason for this wetting of coal is that there is very little ventilation in the coal bunkers, and we have to keep the dust from flying. Sometimes when we wet down the coal so much that it comes out on the skin of the barges the men working in the holds of the barges complain. This wetting down of coal has been the custom and practice as far back as I can remember in

the trimming of the Pacific Mail liners" (p. 2085).

There were no special instructions for this wetting.

"Nobody gave me instructions to play this water on the coal while I was working for the Western Fuel Company, I simply followed what had theretofore been the custom—I have said we would sometimes wet the coal three or four times a day, and for periods from a quarter to half an hour" (p. 2086).

So much, now, for the testimony and its bearings of the men who actually handled the coal on the barges. The government put two customs inspectors on the stand, who had been sent specially to the water-front to report their observations of the transfer of the coal from barge to ship. They are John W. Smith, to whose testimony on another phase we have called attention, and E. D. Enlow. Their testimony is, in effect, that the weighed buckets had more coal, by a sack or two, than the unweighed buckets. Smith speaks of the coaling of the "Korea" (p. 1002). He was accompanied by Enlow and David Powers (pp. 1002, 1003). "The tubs that were not weighed," he says, "were lighter than those that were weighed" (p. 1003). He repeats this:

"The tubs which were weighed were in every case heaping full, well rounded out, and the tubs which were not weighed were hardly ever *rounded out*. To my recollection, none of them were as full as the ones that were weighed. In

the case of the tubs that were not weighed, the coal would sometimes be below the top of the tub. It would quite often be that way, to my recollection, *though I could not say positively*, none of the tubs that were not weighed were rounded out as full as the ones which were weighed. Referring still to the day time, it appeared to me that the tubs that were weighed had more fine coal in them than the tubs that were not weighed" (pp. 1003-4).

This was in December, 1912—in the day time. He goes to the "Korea" again at night, on December 18th, accompanied again by David Powers and Enlow (p. 1004). "On the night of the 18th," he says, "when weights were not being taken, *some* of the buckets were only *fairly filled*" (p. 1006). Some buckets, he starts to say, "to the best of my recollection" were not half full (p. 1006), but such buckets would get Smith, or his testimony, into trouble at once, for a bucket, half full, could not, as we have seen "trip" at the bunker. Smith must have been sensible of this, for he immediately proceeds to say: "There were several times when they had difficulty tripping the tubs at the point of discharge" (p. 1006), but nowhere does he pretend to say that a single bucket failed to trip. Indeed, he adds: "Sometimes I could not see the quantity of coal in the tubs upon these occasions when there was difficulty in tripping them, though I could see at least *a foot* down in the tubs." Twelve inches seems to have been his limit, and he was on the bridge of the "Korea", fifty feet away (p. 1005).

He says also that in the day time the tubs that were not weighed were better filled than they were at night (p. 1006). He left at midnight, returning at half past one in the morning, the hoisting went on until 5 o'clock, and "the situation was about the same in this regard as in the earlier part of the night, except that in the morning, near five o'clock, the unweighed tubs *appeared to me* to be *better filled* when they came up" (p. 1006).

He also says, what has been made clear, we think, by this time, that "the tubs are lifted very rapidly to the bumper after they leave the hold of the barge, I cannot say how long the tubs would be in my view;" and he estimates that he was "about fifty feet away from the place where the operations were going on" (p. 1008). He describes the dumping as "a very quick operation", not as quick as the eye is, but "just as soon as the tub strikes the bumper and is released, it dumps by mechanical device pretty quickly" (pp. 1008-9). He could see into the tub, he will not make it more than a foot, "though I was fifty feet away from it, and only elevated possibly five feet higher than the bumper" (p. 1009).

On one of these occasions in December, he saw the "Theobold" discharging in the day time, the unweighed tubs running better than at night, the weighed tubs rounded out, a good deal of fine coal in them, some with more lumps in them than others

(p. 1009). On being pressed as to his observation, he says:

“Q. Do we understand that from your observation of those tubs they were so loaded as that the weight when recorded would show the greatest amount of coal that could be put into those tubs?

A. Well, they were *pretty near as full* as they could be filled.

Q. Pretty near as full as they could be?

A. And safely carried to the hopper.

Q. And the coal was selected so as to produce the greatest weight?

A. I won't say that *every time* it was selected; *I cannot say that*.

Q. Well, it may have just so happened?

A. *It may have so happened*” (p. 1010).

The foregoing, in the case of Smith, as in the case of the other witnesses, is, we venture to think, a fair presentation of the substance of his testimony. It requires no discussion.

Now, as to Enlow. Says Enlow, speaking of the day-time visit in December, 1912:

“When they took the weight the tubs were well filled, and we saw but little lump coal in them; but when they were not weighed we saw quite a number go up that were not well filled,—a number of times, for instance, you might take a *two-bushel sack* of coal and empty it in the tub without making it any fuller than when they were weighed. Occasionally, therefore, there might be a difference of *a sack of coal* between the tubs that were and were not weighed respectively” (pp. 1048-9).

Enlow was also at the "Korea" on the night of December 18th, "investigating a little matter connected with smuggling," and accompanied on the investigation by Mr. David Powers and Mr. Smith (p. 1049). They were on the bridge of the "Korea", 100 feet, he makes it, from where they were discharging the coal (p. 1049). Again, he makes it 40 or 50 feet, to where the tubs discharge (p. 1049). He distinctly says, "There was no difficulty in tripping the buckets" (p. 1049). "I noticed that when they were weighed, they were well filled, and when they were not weighed, there were many of them that were like in the day time, only worse" (p. 1050). According to him, it was but six or eight inches that they could see down into the tubs (p. 1050). "*A sack or two* of coal could be poured in *some* of them without running over" (p. 1050). And again: "When the tubs were weighed, they were well filled tubs, you could not see much lump coal, but when they were not weighed, we would quite frequently see big lumps of coal down in the bucket" (p. 1051).

It is scarcely worth while to labor the point, the testimony has taught us that the men had more time to put scoopings or fine coal in the weighed bucket, but we quote this from Enlow:

"Q. When you talk about the quality of the coal, you are simply referring to the quality of the coal that is at the top of the tub, are you not?

A. That is all.

Q. And you cannot tell anything about the remainder of the coal that is in the tub, either when it is being weighed, or when it is being dumped, from that distance, can you?

A. No, I could not do that" (p. 1054).

There remains another government witness, also a custom-house man, J. T. F. Burns, who had spent some time at the Mail Dock between 1906 and 1910, fifteen or twenty minutes at a time, a freight inspector, he was "just loafing about, waiting for other freight to come up" (p. 1156). He was asked to give his observation as to the tubs. He says:

"A. My observation of the weighing was that they would take along about *every fourteenth or fifteenth tub*, and when they came up out of the hold of the barge, the coal would be *all falling off of it*, and the other times, you could not see where the coal was in the bucket; once in a while you could see a big lump sticking out of the tub, and *none on the side*. I noticed on one occasion, I saw one weigher having trouble with the men shoveling coal into the tubs, *and he weighed ten tubs*. After he took the first *three* weights, I noticed that *the other seven* buckets were fuller than the first three tubs.

Q. To what extent?

A. To the extent that they came up out of the hold with the coal falling off of them.

Q. Do you recall whether upon those occasions you observed the character of the coal, as to whether it was lump coal or fine coal?

A. No, I don't.

Q. You do not recall.

A. No" (pp. 1156-7).

He is pressed further:

“Q. Upon those occasions, ordinarily, and without referring to any specific occasions, what did you observe regarding the quantity of coal that would be contained in the tubs that were weighed?

A. Well, the exact weight, I could not tell.

Q. I do not mean so far as the pounds or tons are concerned, but I mean as to what you observed regarding the quantity of coal in the tubs, how was the coal located upon the tubs?

A. Well, it always, at any rate *it rather looked* heaped up on the center, and that is the reason I always had the idea it rolled off the center of the tub.

Q. What would you ordinarily observe regarding the quantity of coal contained in these tubs which were *not weighed*?

A. *Well, sometimes you could see the coal in the tub, and sometimes you could not*” (pp. 1157-8).

We go, now, from these three government inspectors, with their occasional or casual observation, to the government representative on the scene, assigned to the transaction, the government weigher, Mr. Freund; and in association with him, to the man who was at his side, the representative of the interest chiefly concerned—Mr. Park, the weigher, or, more accurately, the tally clerk of the Pacific Mail Steamship Company. What is the testimony of Freund and Park?

Mr. Freund is asked:

“Q. I want you to go on and state to the jury what you have observed from time to time while you have acted as assistant weigher

upon those barges weighing draw-back coal so far as the filling of the tubs is concerned?

A. Well, I can state that it has been the usual thing to always have trouble; *the coal shovelers* if they knew you were going to weigh *would load the coal up to the hatch*, right up as high as they could on the tubs; I would holler down the hatch *to Mr. Parks*—he was always clerking as a rule with us—he *would kick about it* and then I would go over the hatch and tell them that *if they didn't quit it we would* make them. I have also spoke to the hatch-tender *and he has told them also*. I have had tubs come up that were loaded so that when they came out of the hatch, or when I came to the hatch—we had orders not to stand over the hatch; our orders from the chief weigher were to stand clear of the hatch and take the tubs at random, but when they knew I would weigh *I have seen them throw on 3 or 4 or 5 shovels of coal to fill it up* and I would let it go by, *I would not weigh it*.

Q. That is, upon occasions you have seen them put on 3 or 4 or 5 shovels of coal when they thought a tub was to be weighed?

A. Yes, sir.

Q. And you say that on some occasions you refused to weigh those tubs?

A. Yes, sir, I did; *I would let them go by*.

Q. Who determined when a weight was to be taken?

A. I would" (pp. 1176-7).

As to the number of tubs weighed at a time, and the time it took, Mr. Freund says:

"Q. What is your testimony as to whether the ordinary practice indulged in was to weigh a round of tubs instead of a tub at random?

A. Well, as I said, sometimes we weighed one, sometimes two in succession, sometimes three and sometimes four.

Q. Did you weigh a random tub as often as you would weigh a round of tubs, or would you weigh a round of tubs more frequently than you would weigh a random tub?

A. I guess I weighed about evenly; I have taken a round as often as I have taken it at random. It is entirely according to conditions.

Q. How long would it take to weigh a round of four tubs, where the tubs had to be weighed on the platform scales?

A. Three or four minutes.

Q. You say 3 or 4 minutes to weigh a round of tubs?

A. Yes, I should judge so.

Q. Did it require as much as 15 minutes?

A. No, I cannot say, unless it has been at times when the barge has a bad list, an inshore list, so that they cannot get the scale—they have to pull the tub out from the center of the hatch clear to the edge of the scale and if the barge listed inshore they could not pull it in, it would be hard work for them to get it over” (pp. 1179-1180).

Mr. Freund testifies further:

“Q. Upon occasions when you would notify the hatchtender that you wanted to weigh a round of tubs and a round of tubs would be weighed by you, what, if anything, did you observe the shovelers down in the hold of the barge doing with reference to the quantity of coal which would be contained in the tubs which you would be called upon to weigh?

A. Well, *on a few occasions* I have caught them *heaping* the tubs and *I would refuse to weigh them*. As a rule I have called them down pretty hard and threatened them that

I would ring up Mr. Mills or somebody and get a gang of men who would do as they were told; *as a rule they gave me pretty good weight.*

Q. Did you ever compel them *to remove coal from the tubs?*

A. Yes, sir.

Q. Was that a frequent occurrence?

A. No. *As a rule I would let the tub go up but refuse to weigh it.*

Q. How often after you would call for weights, would this additional quantity of coal be placed in the tubs?

A. Well, as a rule when I called for a weight I watched them pretty close, that they did not do it. If they didn't see me near the hatch, I wouldn't know whether they did or not. I have caught them once or twice.

Q. How often when you came to weigh tubs of coal would you notice that the tubs contained more coal than they should have contained, and you would direct the tubs to go up *and you would not weigh them*; how often did that occur?

A. I could not tell you; very often" (pp. 1179-1182).

Mr. Park tells, first, his position and duties:

"I am, by occupation, a tallyman and checker, and am now, and have been for about 31 years, employed in that capacity with the Pacific Mail Steamship Company. I have been tallying and checking coal which goes into the vessels of said steamship company at this port. My duties have been to see that the tubs of coal that go up are average tubs, kept even, and to see that the coal would not go overboard, and that it was weighed by the government weigher. I keep a record of the quantity of coal delivered" (pp. 1517-1518).

As to "the coal that is weighed and the coal that is not weighed, it is about an even thing; the tubs are kept as near correct, an average tub, as possible" (p. 1518). The weights are taken, one in fifteen. Like Mr. Freund, he says, "sometimes they would weigh one tub, and then wait until two or three tubs go up, and weigh another one, sometimes they will weigh two tubs at a time, provided that the tubs are average tubs—even—not overloaded" (p. 1519). And at times, when the barges stop,—the chute blocked up—four tubs would be weighed (p. 1537). Mr. Freund, it will be recalled, testified that very often he would send tubs up, without weighing them, because they had too much coal; and Mr. Park says the same thing—"Many times the tubs that are not weighed are heavier than those that are "weighed" (p. 1520). He says further:

"The custom-house officers know what coal is, and they have been at it all their lives; and they are remarkably fine men, I have not a word to say against one of them, everyone of them knew their duty, and I don't think I had a word with any of them. On many steamers we would never have a single word because they knew what they were doing perfectly well" (p. 1549).

And again:

"Nearly all the custom-house officers that I have had during my experience, that have been in the coal weighing for years,—I think know in a minute what an average tub is, and in case the tub is overloaded, they will send it up, or they will take lumps off of the tub

and throw it on the deck, if they consider it too heavy. They have done that many, many times, thrown coal right off on the deck, where it is piled up, and send it up, and don't weigh it" (p. 1533).

Sometimes, but only sometimes, the Western Fuel Company would be represented on the barges. Edward Smith would be the representative on those occasions. Mr. Park is then asked:

"Q. If Mr. Edward Smith was not there, did the Western Fuel Company have anyone representing it for the purpose of ascertaining the weight of these tubs and the weight of coal that had gone into the steamer?

A. Not if I was there and the custom-house officers were there" (p. 1523).

He was also asked as to Mr. Mills, what conversation he ever had with Mr. Mills.

"Well," Mr. Park answers, "Mr. Mills has told me a dozen times to have the tubs kept even, and that in case any coal went overboard—which sometimes it does owing to lumpy coal in the chutes blocking—that if any coal went overboard, to allow so many tubs, what I thought was correct, at the end of the day."

Mr. Parks speaks of the coaling of the "Korea", on the night of December 18, 1912,—the occasion, it will be remembered, when John W. Smith, and Enlow, accompanied by David Powers, were "investigating a little matter of smuggling". Mr. Finnegan was the government weigher from six o'clock to twelve; Mr. James Neelan, from one

o'clock until six in the morning (p. 1527). It is worth while, to hear how a good, honest man like Park, 66 years old (p. 1548)—government counsel thought he was seventy—holding the same position for 31 years, talks about the government weighers that were with him that night—

“I had one of the finest men on the force with me—I had two of them.”

It is the government counsel who is conducting this examination:

“Q. Who was that?

A. Mr. Finnigan was one of the finest on the force.

Q. And he is still on the force?

A. You bet he is.

Q. And he has been on for many years?

A. Yes, sir, and he is a cracker-jack.

Q. He is a cracker-jack, is he?

A. Yes.

Q. He knows how to weigh coal, does he?

A. You bet your life he does. I am very happy to say that the weighers I have had with me during my term with the Pacific Mail Company, were A.No.1 men. If they had not been, they would have been reported in about five minutes to Mr. Chisholm.

Q. Oh, Mr. Chisholm is your boss, is he?

A. Yes.

Q. He is another fine man, isn't he?

A. Well, I have nothing against him. I have found him right at the steamer, repeatedly, both in the day time and the night, and if anything was wrong I wouldn't be there five minutes.

Q. You always get along very agreeably with those weighers, don't you?

A. Yes, sir. Why shouldn't I? They did their duty, and I tried to do mine, and between us I don't think there was any trouble" (pp. 1555-6).

Now, then, Mr. Park says that, on this occasion of the "Korea", Mr. Finnigan would call for one bucket in fifteen—they were weighed with a fair degree of regularity—they were even, average tubs (pp. 1528-9). Mr. Neelan was on the morning shift, from one to six, at no time away from the place where the buckets were being hoisted (p. 1529).

Sometimes Park would make complaint to Mr. Freund, if he thought the bucket was over-filled, but this was not frequent, very seldom (pp. 1529-1530). As to overages in barge deliveries, "it was never reported to me" (p. 1558). "When a barge comes to the dock, I don't know the amount of coal that is in that barge until it is weighed. I am not told how much coal is in the barge, I don't know" (p. 1558). Mr. Mills complained to him on two or three occasions, that the barges were turning out short, and Mr. Park referred him to the weigher (p. 1559). Park was then asked:

"Q. He never told you anything at all about turning out overages?

A. He told me repeatedly to keep my tubs even, and that if any coal went overboard, to take as many tubs as I wanted to make the thing square" (p. 1560).

And finally, on this matter of complaints, he says there were only two instances of complaints

from Pacific Mail engineers, one from Mr. Bunker, and one from Mr. Hamilton, who thought they were "some coal short"; while Mr. Rossiter, chief engineer of the "Korea" "has told me repeatedly that he got his coal; he was taking three thousand tons every time" (pp. 1560-1561).

Mr. Park points out, what has been noted already, that "if the tubs are not loaded correctly, the engineer will have to hit them a tremendous blow, and break something in order to make them tip—a tub of average coal has to be very near even, before it will tip" (p. 1526). And again:

"They have got to be pretty full before they will dump; three quarter tubs won't dump.

Q. Even if coal is filled to the water line *at the mouth*, and is about two feet from the water line *at the back*, you say it won't tip?

A. Oh, they keep their tubs even."

This last was certainly a question "fetched from far". The examination goes on:

"Q. I am assuming that they are kept even. Suppose we experiment with the tubs, as we did the other day, if a tub is filled to the water line *at the mouth*, and within two feet *at the rear*, won't that tub invariably tip on account of the superabundant weight at the front or mouth of the tub?

A. *I have never seen a tub filled that way.*

Q. Wouldn't that tub fill that way?

A. *I have never seen a tub filled that way; they have got to be full before they tip, unless you break something, or try to kill somebody down in the hold, or capsize the tub of coal into the hold*" (pp. 1562-3).

Mr. Park and the trial judge were evidently of one mind on the point, for Mr. McCutchen, at the trial, referring to a visit of court and jury to the scene of the barge deliveries, had taken occasion to say:

“Your honor and the jury didn’t make the measurements the other day; we want to show by the witness (Professor Parr) that a tub that is so empty that a witness could see into it one foot, could not actually be dumped.

The COURT. Didn’t we see that ourselves, and find out that we had to smash things to do it” (p. 1632).

The rough and approximate process of handling coal from a barge to a steamship, is illustrated in the testimony of Mr. Park, not merely by the disparity, as in the testimony of other witnesses between weighed and unweighed tubs, but in the disparity of the weighed tubs themselves, of the same weighed tub—the tubs being numbered 1, 2, 3, 4,—from occasion to occasion. For example, Mr. Park’s entries show that the weights of tub No. 1, from time to time, ran 2300 tons, 2280, 2220, 2230, 2200, 2010; No. 2 tub ran: 2100, 2120, 2180, 2150, 2120, 2140, 2190; No. 3 ran: 2120, 2100, 2270, 2170, 2190, 2100, 2164; No. 4 ran: 2020, 2040, 2230, 2210, 2180, 2100, 2160.

To take a particular period and occasion—the transfer of coal to the steamer “Korea”, June 28, 1911. No. 1 tub ran: 1550 tons, 1550, 1580, 1570, 1540, 1580; No. 2 ran: 1590, 1500, 1600, 1630, 1650,

1560; No. 3 ran: 1720, 1660, 1700, 1750, 1670; No. 4 ran: 1620, 1620, 1680, 1670, 1630, 1660 (p. 1524).

There would be 250 pounds difference in two tubs—the coal would differ, wing, coal, light, lumpy (p. 1525). The discrepancy in the same tub would be 250 pounds, 160 pounds, and so on (see, also, pages 1532-3); the fine coal making more weight than the lump coal (pp. 1525-6). It is not a frequent thing, it is infrequent, for tubs on different occasions to weigh the same number of pounds (p. 1556). Some reference was made on cross-examination of Mr. Park, to the tare or dead-weight of the tubs as being entered in his book at different figures, 615 pounds to a tub at one time, 630, at another, for example (pp. 1543-4). Mr. Park explains this:

“We often on those barges, change the tubs. They break down, and in the hurry, they send another tub. Sometimes they have extra tubs on the barges; and sometimes they have not; they have to send down to the bunkers for them” (p. 1546).

The increase or overage in the weight of the coal when transferred from the barge to the steamship, due to moisture, noted already in the testimony of the witnesses, Edward Powers, Frank Wilson, Arthur O’Leary, is also testified to by Mr. Park. “If the coal is very dry, the crew of the steamer, and also the trimmer, has it wetted down so as to keep the dust from flying” (p. 1518). Speaking of the winter-time, he says:

“These steamers are coaled in rainy weather, as well as in fair weather—the barges are nearly all open from stem to stern, so that the coal is exposed to the weather” (pp. 1518-1519).

Q. Have you ever seen coal being laden into the Pacific Mail steamers that contained considerable moisture?

A. Yes, sir, many times.

Q. Due to what cause, so far as you yourself observed, how did it get wet?

A. Well, we have had barges that have laid in the stream, some of them two months, and they have been exposed to the elements and the rain, and when we would get them, the water would run out of every tub—they would be wet from the top of the coal to the bottom of the barge.

Q. Will you state whether or not, in weighing this coal, any allowance was made by the custom-house weighers on account of moisture in the coal?

A. None whatever” (p. 1520).

He says, further, recalling to us the testimony of Edward Powers:

“I have repeatedly seen the coal hosed down by employees of the Pacific Mail Steamship Company. That would occur when the coal is dry and would spoil the paint on the ship and interfere with the trimming. They generally use an ordinary ship’s hose. They would play the water on the coal for quite a while until it got pretty wet to keep the dust down. *I have called Mr. Chisholm’s attention to that matter often, but it had to be continued for the reasons mentioned. I have repeatedly tried to get a reduction for the water from the government, but the answer I always got was that the government made no allowance for water.*

Mr. Chisholm knows that that is the situation
(p. 1563).

The government bulletin, being Bulletin 63, of the United States Bureau of Mines, entitled, "Sampling Coal Deliveries, and Types of Government Specifications for the Purchase of Coal", under the heading—"Practical Considerations; Moisture"—was put in evidence (pp. 2093-7). It appears from this bulletin that the government made payment for its delivered coal, with direct reference to the moisture content:

"Payment for delivered coal," it is said, "was directly affected by the moisture content of the sample received by the laboratory" (p. 2093).

And further:

"From experiments that have been made, and from a large mass of data, it is known that the moisture content of coal does not remain constant, and that the moisture content reported by the laboratory may be as much as five to ten per cent lower than that actually contained in excessively wet or high-moisture coal at the time of weighing" (p. 2094).

The government bulletin makes some interesting statements, quite pertinent and instructive. We quote:

"If coal of uniform B. t. u. 'dry coal' value is delivered on a contract, the contractor receives the advantage on any delivery in which the moisture content approaches the maximum specified, because he is paid for the weight of water contained in the coal in excess of a normal amount, whereas if the coal is very dry,

containing less than the normal amount of moisture, the purchaser receives the advantage.

“For example, coal is delivered under a contract in which the standards are 14,300 B. t. u. per pound of ‘dry coal’ and a maximum moisture content of 3.5 per cent. The heating value of a ton (2240 pounds) of ‘dry coal’ would be 32,032,000 B. t. u. Assume that the average moisture content of deliveries for a year is 2.5 per cent, then for every 2240 pounds of ‘dry coal’ having a heating value of 32,032,000 B. t. u., the purchaser is required to pay for 56 pounds of water at the same rate per ton as for ‘dry coal’, but as this percentage of moisture in average deliveries is inherently a constituent of the coal, it is considered as part and parcel of the coal by both the purchaser and the seller. If the coal delivered contains 3.5 per cent moisture, to procure 32,032,000 B. t. u., ‘dry coal’, the purchaser has to pay 1 per cent more for coal because of the excess water above the normal amount, whereas, if the coal contains 1.5 per cent moisture, the purchaser pays 1 per cent less for water. As the variations in moisture content, 1.5 or 3.5 per cent, are largely accidental, the season of the year being partly responsible for them, it is equitable that the purchaser and seller should share the uncertainty. The purchaser justly has a right, however, to demand that the seller shall guarantee a maximum moisture content, as a means of enabling the purchaser to compare one coal with another, as a guarantee that the seller will observe precautions against delivering coal that is unduly wet, and as a basis for adjusting the price of exceptionally wet coal” (pp. 2094-5).

If we substitute for "a car of coal in transit", such an open barge as Mr. Park and the other witnesses speak of, the following excerpt from the government bulletin will be seen to be illustrative:

"As an example of the effect of a heavy rain on a car of coal in transit, a precipitation of 3 inches of water on a loaded 50-ton car, area of top about 360 square feet, would increase the weight of the coal 5.01 per cent, provided none of the water drained out or evaporated. It is obvious that *if this coal is weighed and delivered immediately*, special samples for moisture determinations should be collected and prepared at once and sent to the laboratory, as a basis for equitable adjustment of payment on account of the excessive amount of water in the coal" (pp. 2095-2096).

And speaking of coal piled in stock and exposed to the weather, this government publication says:

"The determination of the moisture of coal delivered from stock piles is often of great importance, for the proportion of moisture contained in the small sizes, which are most abundant near the center of a stock pile, and which absorb the rains, and melting snows in districts of heavy snows, may be from ten to fifteen per cent higher than *when* stocked. It is apparent, therefore, that special moisture sample determinations are necessary for equitable adjustment of payment on account of excessive moisture in coal which is stocked in piles exposed to the weather" (pp. 2096-7).

We have now given the court the testimony of the government representative Mr. Freund, in respect to the process of transferring the coal from

the open barge to the steamship's hold. He was there in the interest of the government, for the government was paying draw-backs on that coal. We have also given the court the testimony of the steamship company's representative Mr. Park. He was there in the much larger interest of the steamship company, which was paying, not merely a tax of sixty-seven or forty-five cents a ton, but a purchase price, figured in the government exhibits at \$7.00 a ton, and in no event being less than, say, \$6.50 a ton (p. 493). The process itself as brought out by these two witnesses, was inherently approximative, it was not a weighing process at all as to most of the buckets, it was a matter of comparison and estimate, with all the circumstances of the process making for an excess quantity in the weighed buckets, and as to the weighed buckets themselves, they varied from one bucket to another as much as 250 pounds. In addition, this delivered coal, on the occasion and at the time of delivery, was wetted down, saturated with moisture, and, of consequence, increased in weight; and to this point the testimony of Park, Edward Powers, Frank Wilson, and Arthur O'Leary—wherever there is oral testimony in the case—is strikingly corroborated by the government bulletin.

It only remains to consider the testimony of the Mail Company's engineers, and our review of the transfer of coal from the barges—the deliveries to the steamships—will have been complete. Two of the engineers testified, Mr. Bunker, whose name has been mentioned in connection with a complaint,

and Mr. Sawdon; also Mr. Chisholm, who had been a steamship engineer until he became marine superintendent at San Francisco. These witnesses were called by the government.

Mr. Bunker, who was not in the service of the Mail Company at the time of testifying, had been chief engineer for about six years, making five voyages a year, about thirty-six in all. He had been chief engineer of the "Manchuria", his first large boat. He explains her coal bunkers, the main bunkers including the reserve bunkers. The main bunkers were three—the after main bunker, the forward main bunker, and the reserve bunker; each bunker being divided into decks. This appears on the blue print, which all chief engineers have in their room (pp. 1074-5). The aft-bunker, speaking of the "Manchuria", has a capacity of 969 tons, as also the forward bunker; the reserve bunker takes 1150 tons in the hold, and 575 on the deck above. These figures are based on so many cubic feet to the ton; "some take it at 42, and some at 43; naturally I took it at 43" (p. 1075). Bunker wanted all the coal he could get, evidently.

"I recall," he says, "finding a shortage in the coal, there was one occasion when I wrote a letter about it, namely, Voyage 18" (p. 1075).

He makes the general situation, and his own attitude and policy, frankly clear:

"Q. Had you upon other occasions made complaints regarding alleged shortages in coal?

A. Well, I don't remember of ever making them officially any more than to always kick for more coal, *sometimes when I was not sure of it, but on general principles*. I was working for the Pacific Mail, and *if I even had a suspicion that we were short of coal I didn't lose any chance to register a kick about it*.

"Most of my complaints were made to Powers, who was the weigher for the company. On a few occasions I complained to Chisholm, the marine superintendent. I complained more than once to Eddie Powers. He was the outside man for them and, of course, I used to tell him I thought the weights were not right. I do not remember making a personal complaint to the defendant Mills. I told him several times that I thought his coal was 'bum', and that it was short on weight. Mills on such occasions told me that the government weighed the coal, and what could he do about it. I do not remember his saying anything else on such occasions" (pp. 1075-6).

Bunker's complaint in respect to Voyage 18, is in a letter of January 29, 1909, written by him from Honolulu to Mr. Chisholm (pp. 1078-9). He writes:

"Have weighed samples of the coal supplied in S. F. and find it runs 41 cubic feet per ton (when allowed to partly dry out); by allowing this average, we are still 123 tons short. This shortage I have charged to port consumption at S. F. making 309 tons in place of 186 tons as actually burned.

"I recall writing that letter," says Mr. Bunker. "Before Voyage 18 I had made complaints regarding shortages of coal only in a general way, personal complaints to Powers and to Chisholm, etc. I should say it was

several voyages before that, that I talked to Chisholm; he would talk the matter over with me, and wanted to know if I had any suggestion to make *where we could do better*" (p. 1079). Bunker explains how "I arrived at the 123 tons shortage on this Voyage 18, concerning which I wrote to Mr. Chisholm—I weighed the coal in a tub, and got the weight per cubic foot *as near as I could*, then I computed the amount in the bunkers at that weight" (p. 1080). "I simply measured it, and weighed it on steel yards that we carried on board, I did not make any further investigations for the purpose of determining whether or not there was a shortage at the time I burned the coal" (p. 1080). He adds: "After Voyage 18, I did not make any more accurate measurements of my coal for the purpose of finding out whether there were any shortages. I had the coal distributed through the various bunkers, and therefore it would be impossible to tell to a ton just what was put in the bunkers. I do not remember making any more complaints to Chisholm, except talking in a general way" (pp. 1080-1081).

After Voyage 18, Bunker made arrangements to do most of his coaling in the Orient, and on the last two voyages, took no coal at San Francisco (p. 1081). The point was, in using Japanese coal:

"I could get more heat units out of it than I did out of the Western Fuel Company's coal, it was a better quality";

and the Japanese coal was delivered on estimated weight, whether by draught of the barges, Bunker could not say; and when asked if he had occasion to insist

“upon additional weights there frequently, I would say I never gave the Mail Company any the worst of it” (p. 1095).

Bunker was frank enough, certainly. He is asked:

“Q. Is it not the fact that the complaint or suggestions which you had to make concerning the coal here bore more on the quality of the coal than the quantity of the coal?

A. Well, I suppose of the two the quality had more to do with it or as much to do with it as the quantity, or more so, but I could not kick about the quality but I could kick about the quantity.

Q. You knew that the Western Fuel Company was giving you whatever quality coal it had, and yet it was not satisfactory to you as a matter of fact, was it?

A. That is the idea.

Q. You felt you were not getting the proper amount of heat units out of it that you could get out of other coal; was not that the fact?

A. Yes, sir.

Q. And naturally it was not as satisfactory to you for that reason as an engineer, was it?

A. I would not say it was entirely due to the quality here. The quality had a good deal to do with it, but I also felt that it was more or less short on the quantity and I made sure to report it.

Q. And so you made this written report that has been put in evidence here?

A. Yes, sir.

Q. It is not an unusual thing, is it, Mr. Bunker, for engineers who have at heart the welfare of their employer, to register a protest against the quantity of coal that steamers have

received all over the world at every coaling port?

A. *Well, I expect I would do it if I thought I could get more coal by it.*

Q. And that is so virtually at any port at which any of your vessels coaled?

A. I don't know what the other engineers do, Mr. Knight; *I know what I did*" (pp. 1093-4).

And speaking of 43 cubic feet as against 42, Bunker says:

"I know when I figured the bunkers out, I am almost sure I figured them at 43, in order to get as little coal charged for as possible to fill the bunker.

Q. In order to make the quantity large for as small a cost as possible?

A. Yes, sir" (p. 1084).

Bunker's methods of estimating his coal cargo did not produce exact figures:

"I could not tell you the exact figures, but there was quite a lot on the top of the deck, that I had the Chinamen, when I got to sea, level 'off to four feet in height, and square it off, so that I could measure it off and get the cubical contents of the pile.

Q. And that is the method by which you estimated the cubical contents of the particular pile of coal?

A. Yes, sir.

Q. And that is the method by which you estimated the entire amount of coal cargo you had taken on board?

A. That is the only way I could get at it without weighing it off" (pp. 1085-6).

And further:

“Q. But it would be rather difficult, would it not, Mr. Bunker, unless we adopted some particular method of measuring the coal, to determine with any degree of accuracy the amount of coal in the ‘Manchuria’, if she was at all well loaded with coal?

A. Yes, certainly. I only measured this, as I believe I said before, as best I could, to be sure, of course, that the Pacific Mail was not getting the worst of it.

Q. Otherwise you feel it would be impossible to determine with any degree of accuracy, how much coal was put on a vessel?

A. *Well, I would not like to say I was very close to it; it was the best of my judgment*” (p. 1089).

And finally, Bunker has no difficulty as to the moisture in his coal:

“I presume,” he says, “it must have been more or less wet in going in” (p. 1087).

So much for Mr. Bunker, for Voyage 18 and his complaint about it, and for his policy as to complaints generally. Now, for the other engineer, Mr. Sawdon.

Mr. Sawdon has been for some 26 years, marine engineer with the Pacific Mail Steamship Company, serving, as chief engineer of the “Mongolia” for four years of the time, from 1906 to 1910 (p. 1146).

The “Mongolia” and “Manchuria” are sister ships. As chief engineer of the “Mongolia”, Sawdon had in his room a blue print showing the dimensions and capacity of the the ship’s bunkers.

The "Mongolia" would take on at San Francisco from 2500 to 2800 tons of coal.

"When I was chief engineer on the 'Mongolia', I kept myself advised concerning the capacity of the coal bunkers, I would go in them every day" (p. 1147).

The bunker capacity is figured at 42, not Bunker's 43 cubic feet to the ton (p. 1147). Mr. Sawdon now tells us:

"After the 'Mongolia' had been coaled in San Francisco, I would make an examination of the bunkers into which the coal had been discharged. I had to O.K. the bills that were presented by the Western Fuel Company. I would be a funny engineer not to examine my bunkers to see how much coal I had before I left San Francisco. I certainly examined the bunkers for the purpose of enabling me to pass intelligently upon the bills of the Western Fuel Company. I always went through the bunkers, therefore, when they finished coaling. I would thus find out to what extent the bunkers were filled, so far as it was possible to gain that information. So far as the broken bunkers were concerned, I would know pretty close to the amount of coal that was already in them before the Western Fuel Company started to discharge coal into them. I would know to within 15 or 25 tons. When the Western Fuel Company finished the coaling, I would again examine the bunkers as soon as I could go through the manhole to look around" (pp. 1147-8).

Government counsel puts this question:

"Q. During the period of time to which you have referred, these four years, while the 'Mongolia' was being coaled from time to time

at the port of San Francisco, state whether you noticed at any time a shortage in the quantity of coal supplied to your ship by the Western Fuel Company, as tested, between the quantity of coal which you found to be upon the ship and the bill presented by the Western Fuel Company for your O.K.?

A. The amount that they discharged into the ship, that is what I am trying to get at; where we take the bunkers at 42 feet and the man tells me that the coal is running heavy, 39 cubic feet, $28\frac{1}{2}$, it goes to show that between the weights *I had no kick about it*; in other words, if the coal was running 42 feet, as we would take the bunker capacity, it would show a shortage of coal.

Mr. ROCHE. Q. In ascertaining whether there was or was not a shortage, would you take the cubic feet contained in a ton of coal as specified in your blue-print and plans?

A. Would I take it?

Q. Would you take *42 cubic feet* to be contained in the ordinary ton of coal?

A. That is what we were going by; *that is what we went by on the ship*.

Q. Assuming that there were 42 cubic feet of coal in a ton, upon these occasions to which you have referred was there or was there not a shortage in the coal?

The COURT. He has said there was on that assumption, *and he has further said inferentially that if he took the statement of Mr. Park, or the other gentlemen, that the coal was running heavy at 39 feet, that there was not*.

Mr. ROCHE. Very well. Your honor is correct in that statement.

The COURT. Yes" (pp. 1148-9).

Indeed, the measurement of coal in bunker is misleading. The coal drops, on transfer from barge to bunker, some 70 to 80 feet (p. 2091).

“The bituminous coals that the Western Fuel Company furnish to the Pacific Mail Steamship Company, would be greatly broken up and closely packed in the course of this drop—in other words, the measurement of the coal in that bunker would be misleading as to weight because it would be packed so hard and firm after this long drop” (p. 2091).

Mr. Sawdon never made a calculation “for the purpose of determining whether there was or was not a shortage of coal on board”, after leaving San Francisco and while the boat was consuming coal (p. 1151).

The government also examined Mr. Sawdon as to the unweighed and the weighed tubs. He would stop and watch the operation for ten or fifteen minutes at a time, at a distance of 30 to 40 feet from the point where the buckets were tripped (p. 1150). He says:

“If I watched closely I could see the tub or bucket as it was being hoisted. The bucket, however, was travelling right fast, you know. In answer to the question whether I upon occasions watched the buckets, I would say that I have for a short time. I have taken a look on many occasions, and in connection with different voyages. Sometimes I have observed weights being taken, and I would notice the tubs which were weighed as they were being hoisted up from the scales. I would notice then that the tubs that were weighed were quite full. There would be more coal, as a general thing, in those tubs than in the tubs that were hoisted and were not weighed. I would say that the ordinary

tub, that is to say, the unweighed tub, *would be run on water measure*, by which I mean *that it would be full to level*. The other tubs, that is the weighed tubs would be *rounded up a little*, and there would be *a little more coal in them*. That is the way it appeared to me" (pp. 1150-1).

There remains William Chisholm, for something like seven years marine superintendent of the Pacific Mail Steamship Company, and prior thereto chief engineer of the "Mongolia".

"It is part of my duty to see and to know that the weights for which the Pacific Mail Steamship Company pays the Western Fuel Company are correct" (pp. 436, 440-441).

Mr. Chisholm received two complaints of shortage in deliveries, one from Bunker, of which we have spoken, and one from an engineer named Hamilton. The Bunker complaint, as we have seen, was in 1909, the Hamilton complaint in 1911 or 1912 (p. 442). Mr. Chisholm says:

"After receiving the reports that the Pacific Mail Steamship Company was not receiving full weight on the deliveries of coal to its liners I made certain investigations. I could not find any proof that we were short, and, of course, it was my duty to know whether we were short or not. I watched the operations of the barges very closely, and I also looked over the performance of our ships to see whether they were running short of coal in any way. I would examine, for instance, the log sheet of the ship, which shows the consumption of coal on each voyage, and also shows the quantity of coal delivered to the ships and the quantity that was in the ship's

bunkers before the voyage began. My experience was such as to enable me to tell about what the consumption of coal on a given voyage would be. Using all of that information, and making the investigation which I have said I did make, I reached the conclusion that the Pacific Mail Steamship Company was not paying for any more coal than it was actually receiving" (pp. 442-443).

Mr. Chisholm further testifies:

"During the time that I have been marine superintendent of the Pacific Mail Steamship Company the company has had in commission 17 or 20 liners. Four are large steamers, three intermediate size ships, and about fourteen small ones. Of that entire number about four large liners have bunkers so situated that the contents can be ascertained after the ship has coaled. Those four large ships have made on the average four and a half voyages a year during the time I have been marine superintendent. That would be in five years approximately 22 voyages for each of those four steamers, or 88 voyages in the aggregate. I have received in all those 88 voyages 2 complaints with reference to the deliveries of coal to the steamers by the Western Fuel Company" (pp. 458-9).

He says, further:

"I have said that with the exception of the reserve bunker on the 'Mongolia' and 'Manchuria', those large steamers have their bunkers so placed that the chief engineer can measure the coal in the bunkers after the loading is complete. The capacity of the reserve bunker is known. It ought to be quite easy to tell after the coaling operation is completed whether or not the reserve bunker has been filled to its capacity. Therefore, *know-*

ing the capacity of the reserve bunker, and so being able to tell whether it has been loaded to its capacity, and it being possible to get at the other bunkers on those ships, there is no difficulty whatever in an engineer being able to determine the amount of coal that he has on hand before his ship sails. If there had been a system of short-weighing pursued in the delivery of coal to the smaller steamers there would, during all the time I have been marine superintendent, have been no difficulty in discovering that fact" (p. 459).

And again:

"Q. Now, you have said that the capacities of these steamers which you have designated as 'medium size' and 'small' is ascertainable easily. Let me ask you whether you ever received any complaint during the five years that you were marine superintendent of the Pacific Mail Steamship Company from any captain of one of those medium-sized or small steamers, as to the quantity of coal delivered to the steamer?

A. No.

Q. You never did?

A. No.

Q. Did you ever receive any such complaint from the chief engineer of any one of those medium-sized or small boats?

A. No" (pp. 461-2).

Over and above the two complaints from the big ships, Bunker on the "Manchuria" and Hamilton on the "Siberia", we have something by way of insinuation—"indirectly," says Mr. Chisholm, "I have been notified, as marine superintendent, that the coal was being over-weighed" (p. 441). The government counsel continues the inquiry:

“Q. So that the indirect notices which you received from time to time, related to a general over-weighing of coal, isn't that correct, and not to specific instances?

A. I received, I think, on two occasions, one or two occasions, indirectly an *insinuation* that we were getting a short amount of coal on our ships” (p. 456).

We are not long waiting for the source of the insinuation. Government counsel continues:

“Q. You say that you received directly——

A. (Intg.) Indirectly. It was an indirect insinuation, it was an insinuation that we were getting a short amount of coal.

Q. Isn't it a fact that you received a direct statement from David S. Powers, to the effect that the Pacific Mail Steamship Company was being over-weighed upon coal?

A. Not directly.

Q. What do you mean by ‘not directly’?

A. When David Powers came out of jail he came to me *to appeal for his father and himself to coal our steamers*. He was down seeing me on one or two occasions; that is, I should judge, in 1912, after he got out of Alameda County Jail. I told Mr. Powers the last time, I says, ‘*You put yourself on record.*’ He told me that he could, if him and his father could get the coaling back, that he would save the Pacific Mail Company a great deal of money, and he would get more coal in the bunkers than at the present time was getting in.

Q. When was that?

A. That was, I should judge, around, shortly before the indictment of Mr. Donaldson, around, I should judge, in August.

Q. August of what year?

A. I think last year.

Q. Now, he did tell you—you don't mean the present year?

A. No, 1912.

Q. So that you were told at that time, were you not, by him, that there had been overweighing of coal?

A. Not directly. When I put the question to him directly for his information, he said, 'Well', *he shrugged his shoulders and walked away*" (pp. 456-7).

The second phase of insinuation, like the first, is barren of facts, and likewise goes to the Powers family for its source, this time to Edward Powers. Mr. Chisholm is asked:

"Q. From what other sources did you indirectly receive information that there was a general overweighing of coal?

A. That same year, I should judge it was, around about the spring, his brother, Eddie, came to me and wanted *to get his father back in the coaling business*, that is, *trimming the coal*, and he intimated, *he did not come right out directly*, and when I told him, I says, 'What have you to show for this'? he says, 'Well, if we get our coaling back, if we could get coaling our ships, or your ships, we could save you a whole lot of money, on the storage of coal.'

Q. That was in the early part of 1912; is that correct?

A. No, I don't remember exactly when it was; it was shortly, I should judge, before Dave was down there.

Q. Now, after having received those two communications to which you have referred, the written communications, and these indirect charges that the coal was being overweighed, did you at any time attempt to find out at what weight the coal was laden *into* the barges?

A. No" (pp. 457-8).

We call attention to the last clause in this last question—"At what weight the coal was laden *into* the barges." We have quoted fully from Mr. Chisholm as to his investigations and conclusions touching the question whether "the Pacific Mail Steamship Company was not paying for any more coal than it was actually receiving". That was the thing that Mr. Chisholm, like Mr. Park, was interested in—the quantity of coal actually delivered, not *into* the barge at the Folsom Street bunkers or elsewhere, but *out of* the barge, into the steamship at the mail dock. This last question does not invite him to renew his testimony as to his investigations concerning these actual deliveries out of the barge.

Now, for the two specific instances, namely, Bunker and Hamilton. It will be remembered that Bunker, in his letter of January 29, 1909, reported a shortage of 123 tons, and this shortage he "charged to port consumption at S. F., making 309 tons in place of 186 tons, as actually burned" (p. 455).

Mr. Chisholm testifies:

"Q. The letter from Chief Engineer Bunker, which has been called to your attention, says, among other things, 'this shortage I have charged to port consumption at San Francisco, making 309 tons, in place of 186 tons as actually burned'—did you make any investigation, after receiving that communication, for the purpose of determining how the port consumption which the chief engineer refers to in his letter, compared with his port consumption ordinarily?

A. Yes.

Q. Did you make any investigations to determine what his port consumption should have been for the time he was in port on that occasion?

A. Yes.

Q. What did you determine that he should properly have consumed in port during that time?

A. 225.

Q. 225 tons?

A. Yes.

Q. Then you don't think he could have possibly got along with 186 tons during his stay in port on that occasion?

A. No.

Q. Assuming that he had reported 225 tons as his port consumption during that stay, would not that consumption have been exceedingly small for the time he was in port?

A. The 225?

Q. Yes?

A. No, it would be about right.

Q. It would be about right?

A. Yes'' (pp. 459-460).

It thus appears that Bunker charged only 186 tons to the port, when he should have charged 225, or 39 tons more. The shortage, therefore, of 123 tons, charged not to the port but to the voyage, should be abated by 39 tons, for which the voyage was not responsible—leaving a balance of shortage chargeable to the voyage on Bunker's very liberal methods, including his 43 cubic feet to the ton, of only 84 tons.

This is not all in respect to Bunker's voyage 18. Mr. Chisholm was asked:

“Q. Did you make any investigation, after receiving that complaint, to determine how Chief Engineer Bunker’s consumption of coal on that voyage compared with his consumption of coal on other voyages?

A. Yes.

Q. What was the result of that investigation?

A. The voyage was lower than the previous voyage.

Mr. McCUTCHEN. That is to say, according to the log of Captain Bunker on that voyage on which he complained of having been short-weighted, he made a better record than he had ever made before on any previous voyage.

A. Yes.

Q. That is to say, his consumption of coal was less per mile than on any voyage he had previously made?

A. The gross amount of coal, the total amount of coal he received during that voyage, was less.

Q. The total amount of coal he received during that voyage was less?

A. Yes.

Q. Did he get all of his coal for that voyage at San Francisco?

A. No.

Q. Where else did he get coal?

A. Nagasaki, I think, and I don’t know if he took any at Honolulu or not.

Q. At any rate, when he returned here, he reported to you the coal which he had received at foreign ports?

A. Yes.

Q. And you took that into account in reaching the conclusion which you have announced here, that he had made a better record on that voyage than he ever had made during any previous or subsequent voyages?

A. Yes” (pp. 460-461).

As to the Hamilton complaint: The Hamilton letter relates to the "Siberia", and was written January 31, 1910, from Honolulu—about one-sixth of the trans-Pacific voyage from San Francisco (pp. 453-4). The letter is set out in the transcript (p. 444). It deals, not with a shortage of quantity, as we have been viewing such a shortage, but with an overage from moisture that "went in with the coal". We quote from the letter:

"Our average daily consumption was 160 tons, but I have to log 7 tons *per day more* to bring the bunkers square, *as from the amount we were charged with fully 100 tons of rain water went in with the coal*" (p. 444).

We have shown, over and over again,—the matter is not in dispute—that it was the Pacific Mail employees themselves, ships' men or trimmers', who poured water into the coal, wherever "rain water" was not present in sufficient quantities for saturation. The wetting of the barge coal was inherent in the operation, there was no way of stopping it. Mr. Chisholm asked:

"Q. Now, getting back to this complaint or this communication as it was referred to by Mr. McCutchen, signed by J. S. Hamilton, on the 31st day of January, 1910, you, of course, read that language, did you not, which is contained in this letter in which it is said: 'Our average daily consumption was 168 tons, but I have to log 7 tons per day more to bring the bunkers square, as from the amount we were charged with fully 100 tons of rainwater went into the coal.' Of course, as marine superintendent of the Pacific Mail Steamship Company

you did not intend to permit your employers to pay for rainwater, did you?

A. I don't see how we could stop it.

Mr. ROCHE. Q. Well did you, after receiving this document which Mr. McCutchen designates as a communication and which I designate as a complaint, make any complaint to the Western Fuel Company seeking a return of that portion of the money paid to it representing the 100 tons of rain water?

A. I respectfully referred that to our manager who handles those cases" (p. 452).

Mr. Chisholm's testimony brings to a close the examination of this record touching the transfer of coal from the barges. We have considered this record at great length, tediously it may well be, exhaustively, fairly and frankly. It has been a painstaking and irksome task for counsel; it will not be a light task for this court to go over what counsel have laboriously examined and presented. But there is a grave duty here, imposed upon counsel and imposed upon the court, where the liberty and the personal honor of the citizen are at stake; and however searching and tedious our inquest into the testimony may have been, we venture to think, in presence of a record as voluminous as this, that our study of the case will be a real help to the court. We have considered the business and process of coaling steamships from barges—the inherent character of such a business, the commodity it deals with, the methods of handling that commodity in the haste and stress of coaling steamships ready for sea, the government regulations, drawn in recognition of

the rough and approximative nature of the process, and accordingly adapted to the methods pursued; the conditions of filling and loading the buckets, as between the buckets that were weighed and the buckets that were not weighed, and the saturation of the coal at the time of delivery. We have seen that the weight ascribed to the coal that went *into* the barges was registered on a rising beam—the weight of the coal that went *out of* the barges was recorded on an even beam. We have seen that screenings and yard coal, from time to time, went unweighed into the pockets of the bunkers, and thence into the barges, and we have learned the reason why—because the barges were, in effect, floating warehouses, and it was important to Mr. Mills to know, in a general and approximative way only, the quantity of coal distributed among his barges, to the end that he might make his assignments of barge to steamship accordingly, and hence it was that the entries in the Mills blotter were, in a sense, misleading, made roughly and inartificially, and requiring correction and abatement in the percentages expressive of overage. We have examined the testimony of the men who actually handled the coal out of the barges—shovelers, hatch-tenders, general foreman, trimmer; we have examined the testimony of the representatives of the parties in interest—of the government weigher representing the government, with its incidental interest in the draw-backs, of the Pacific Mail Company's tally-clerk, representing the principal and large interest, the inter-

est of the purchaser of the coal; and we have examined the testimony of the steamship engineers and of the marine superintendent. We have seen that the overage from the barges, year in and year out, for all the years, 1904 to 1912, was, in its maximum expression, 4.99 per cent. We have shown from the overwhelming testimony, testimony not simply consistent with the absence of any conspiracy to defraud, but inconsistent with the hypothesis of such conspiracy, that the overage resulted from conditions in the handling and transfer of the commodity, that were inherent, characteristic, and inevitable. Regardless, now, of the conspiracy charged in the indictment, this evidence puts it beyond all reasonable doubting that there was no conspiracy on the part of these defendants to defraud the Pacific Mail Steamship Company, or, from any point of view, to defraud the government. Their conviction was a miscarriage of justice. They are entitled to a fair trial, and that means a new trial.

OVERTIME AND DONATION ACCOUNT.

We have now completed the review of the case, except for two matters thrown in, not as any substantial evidence, but apparently to excite some sort of suspicion—the payment of overtime to the weighers, and the donation account.

As to the overtime: The Western Fuel Company, like every other importer, had been in the habit of paying the weighers a dollar an hour overtime, when they worked at night, to save demurrage and get a

speedy discharge of the vessel, or, as the case might be, a speedy delivery from the barge in case of a steamer ready to put out to sea. Mr. Mayer was asked:

“Q. About the overtime of the custom-house officers, Mr. Mayer—a fact that all the big importers down on the front, whether they were coal dealers or not, when they had to do work at night, like getting out freight for the East, perishable freight, and where it meant a great deal to them to work at night, whether or not they paid the custom-house officers too?

A. Ever since I remember on the front, custom-house officers were paid for overtime.

Q. And is that a fact as to all the big concerns in business down there—in so far as you know—whether in the coal business or any other kind of business?

A. Yes, sir, so far as I know” (pp. 2030-31).

“I can name parties,” he continues, “who paid overtime to weighers between the years 1906 and 1912; for example, Taylors, who are large importers, and the Pacific Coast Coal Company. I do not know of any other persons of my own knowledge, but the weighers told me, that is where my information comes from. I know all the people interested in the coal business paid overtime to the weighers between 1906 and 1912, but I cannot mention any more names” (p. 2032).

He paid a dollar an hour overtime, noted the payment, and gave it to the timekeeper, who entered it in his book (pp. 2022-3). This thing ran back to the time of Rosenfeld Sons, before the Western Fuel Company came into existence—“they all do it, John Rosenfeld Sons, Dunsmuir, the Pacific Coast Coal Company, everybody did” (p. 2025). An at-

tempt was made at this point to give color to the examination, but the court rebuked it. This question was put to Mayer:

“Q. They all *tip* them, do they?

A. They don't tip them; they pay them for their labor.

Mr. McCUTCHEN. I submit that that is improper, if your honor please.

Mr. SULLIVAN. That was the witness' testimony, I submit, if your honor please.

The COURT. I know, but it doesn't help anything to characterize it as tipping a weigher. The witness has testified to what was done.

Mr. SULLIVAN. All right, your honor” (pp. 2025-6).

Bud Hopkins, the timekeeper, says that between June, 1907, and January, 1911, “possibly between \$250 and \$300 a year was paid for overtime to the assistant custom weighers”. For one period, June 1, 1910, to December 31, 1910, the amount was \$240.50, but that included an unusually large item, very unusual, of \$35.50, in the unloading of the “Manhattan” (pp. 1281, 1282).

Mr. J. B. Smith says:

“I recall that the method of compensating the custom-house weighers on the water-front for overtime was changed at various periods, but I do not remember the actual details. We always recognized over-time on the water front by payment” (p. 2167).

This reference by Mr. Smith to the change in method of compensating weighers for overtime, leads us to the testimony of the custom-house officials, Mr. Blinn and Mr. Cook.

Mr. Charles H. Blinn, for two years acting deputy collector of the port, and for 35 years connected with the customs service, had been special deputy surveyor for five years before becoming deputy collector of customs. During these five years, the assistant weighers, as being attached to the Surveyor's Department, were under his jurisdiction (p. 1272).

"Prior to the month of March, 1906," says Mr. Blinn, "the assistant weighers *were paid for overtime by the importers*. The compensation would be \$4.00, or \$8.00 when the weigher worked at night. The payment was made to him direct by the cashier of customs, the money being deposited with that officer by the importer" (pp. 1272-3).

Between March, 1906, and January 1, 1911, this practice was changed under an order of the department, and those weighers who worked at night were allowed a day off, not necessarily the next day—no other compensation being known to the office; and that was the situation until 1911, except that an allowance was made for Sunday work, but no money was paid by the importer to the government. Fifteen or twenty years back, the importers paid the weighers directly for overtime; then for four or five years prior to 1906,

"the practice was for the importer to pay this overtime to the assistant weigher through the cashier. At the present time, also the assistant weighers are compensated in that way. The regulation by which this was brought into effect was in 1911, but I do not recall the exact date" (p. 1273).

Mr. Cook's testimony is along the same lines (pp. 1274-1280).

As to the donation account: when the Western Fuel Company took over the business of Rosenfeld Sons, Mr. Rosenfeld told Mr. J. B. Smith of the practice of Rosenfeld Sons to give a gratuity to the employes on the dock, for courtesies extended, and Mr. J. B. Smith continued the practice. These gratuities, along with donations to charitable institutions and people in distress, make up what is called the donation account. In that account is an item, under date of January, 1908, \$107.00, says Tidwell, and "the voucher corresponding thereto, discloses Christmas donations to the Mail Dock" (pp. 657-8). The amount of the voucher is \$150.00, and during December of the same year, Tidwell continues, there is a voucher for Pacific Mail donations, Chisholm \$70.00, Wilson \$25.00, Park \$20.00, Blake \$10.00, and Dunn \$20.00 (p. 658); and Mr. Chisholm, the marine superintendent, says he received a Christmas donation in 1908, "it was about \$50.00," and that was the amount he received each succeeding Christmas. He also got some coal, about \$14.00 worth a year, a ton or two, (pp. 438, 466), and Thompson, the purchasing agent of the Pacific Mail, got coal in the same way (p. 1241). Park, who got \$20 at Christmas, used to give the Fuel Company the daily reports of the coalings, sometimes considerable work (p. 1532), and as to Thompson, it was appreciated by the company, dealing with a large institution like the Pacific

Mail Steamship Company, that its bills were expedited. Mr. R. P. Schwerin, the executive head of the Mail Company, to which the Western Fuel Company had sold three million dollars worth of coal, got some coal for his domestic use, for which no bills were rendered to him—in six years, about \$1400.00 worth of coal (pp. 1235, 1237). At page 652 of the transcript is set out U. S. Exhibit No. 136, entitled: “Extracts from Donation Account”. It covers the period of approximately seven years, from April 5, 1906, to January 31, 1913. It shows donations of small amounts of coal to Pacific Mail employes as follows:

Captain Anderson, two small items, one in April, 1906, the other in April, 1907, in all, \$34.46;

Chief Allen, Chief Engineer of the “Asia” (p. 437) seven amounts between January, 1907, and January, 1909, in all \$63.14;

Captain Wilson, in charge of dock stevedores at Mail Dock (p. 437), twelve amounts between September, 1906, and May, 1911, in all \$172.98;

P. McCarthy, assistant in treasurer’s office of Mail Company (p. 2161), sixteen amounts between July, 1906, and December, 1912, in all \$148.00;

J. Hauxhurst, formerly marine superintendent (p. 438), two amounts, June and September, 1906, in all \$30.06;

Three assistant weighers are named in this account, for small amounts—Freund, \$19.00 in November, 1909, \$9.50 December 31, 1909, and \$4.75

October 31, 1912; Finnigan, March 29, 1907, \$8.00; Roundy, October 22, 1910, \$7.10, and Twigg, August 31, 1912, \$9.50, and January 31, 1913, \$4.75.

It will not be seriously assumed that these small gratuities were the purchase price of the persons named, for participation in a conspiracy to defraud the Pacific Mail Steamship Company of some \$300,000, and, in lesser degree, the government. Mr. J. B. Smith states the matter fully and frankly:

“Our practice or custom of making certain presents to some of the employees of the Pacific Mail Steamship Company at Christmas time began with the first Christmas after the incorporation of the Western Fuel Company. These presents amounted to about \$125.00 or \$150 a year. Mr. Rosenfeld told me that it had been the practice of his company to give a gratuity to the employes down on the dock, for many little courtesies extended to the company, and I wished to continue to operate the business as a whole along the lines of John Rosenfeld Sons” (pp. 2166-7)

And Mr. Tidwell testifies:

“I think there are some donations to charities in the donation account; that is, the donation account generally apart from the list which I have prepared. Whether the majority in amount of money shown to have been donated was donated to charitable organizations, or not, I don't know, because I did not foot up the entire account and deduct from it the amount which appeared to have been donated to charities. It is true that the names are stated in full of various charitable institutions. I cannot even say whether a large proportion of the names on the donation account are the

names of charitable institutions. There are a number of such institutions in the donation account. There are people in that account who are neither employees of the Pacific Mail nor of the Government nor of any body else. There are names of individuals as well as of institutions" (pp. 659-660).

Mr. J. B. Smith continues:

"Our so-called 'Donation Account' is one kept for coal that is given to charitable institutions, to people in distress, to people we feel exchange courtesies with the company to whom we make no charge for coal furnished. I know all about the giving of coal to Mr. McCarthy of the Pacific Mail Company, whose name appears in this donation account. He is an assistant in the Treasurer's Department, and has to do with the paying of the Western Fuel Company's coal bills. With respect to Mr. Thompson whose name also appears in that account, I do not know him personally, but I know that he is connected with the Pacific Mail Company, and that his duties are to pass upon and audit coal bills. Both of those gentlemen therefore have duties connected with the time of issuing vouchers and the time within which money can be collected for bills. The reason that I allowed these gentlemen to have an occasional ton of coal was to expedite the payment of our coal bills. They handle and pass bills for payment. In a large corporation like the Pacific Mail Steamship Company, our bills might kick around for a month before we could get our pay, and, therefore, it is an accommodation to us that these gentlemen hurry our bills along, and I feel that in sending them an occasional ton of coal I am simply exchanging courtesies with them. There are also a great many people in our donation account with whom the Western Fuel Company had no busi-

ness dealings at all. It is a fact that Vice-President Schwerin of the Pacific Mail Company has, since the fire of 1906, received coal from us from time to time for his personal use, for which he has not paid any money. To the best of my recollection, Mr. Schwerin first received coal without paying for it shortly after April, 1906. Prior to that time he sent his personal check for coal. The change came about in this way: shortly after the fire and during the confusion of things, Mr. Schwerin's bills for coal were placed on my desk, and I made up my mind that I was not going to allow him to pay for his coal for his household use. Many time he asked me to send him a bill and I told him I would, but I never did. I thought it was rather a small thing to send a man a bill for a ton or two of coal when we were doing a large business together. I regarded this matter simply as an exchange of courtesies between us. I made up my mind that despite the fact that he asked me to send him a bill that I would not let him pay for his coal, and I took steps accordingly" (pp. 2161-2163).

And, further:

"I had absolute charge of the donation account. I principally determine the amount and the beneficiaries of these donations, but when I thought that there were questions regarding certain charitable organizations, as to the amounts, I discussed such questions with others. Mr. Chisholm did not to my knowledge receive more than nine tons of coal by donation. I am supposed to have a thorough knowledge of the disposition of these donations and of their extent. Coal was not to my knowledge frequently given to Mr. Chisholm and others of which no record was kept by the company. I was here in court when Mr. Chisholm testified he got all his coal from the Western Fuel Com-

pany for years past. I think he is the superintending engineer for the Pacific Mail Steamship Company. If he attends to his duties, he certainly looks after the coal that is received by that company. Mr. McCarthy is in the Treasury Department. He is a long-time friend of mine, for 30 years. When you asked me whether 'I had to give him coal to grease the wheels in his office down there', I will answer that if you want to assume it that way you can. I don't know Mr. Thompson of the Pacific Mail, and I do not know what his title was there. I knew that our bills or claims had to go through his office. I am not aware that certain engineers of the Pacific Mail Steamship Company also received donations. I am not aware of the fact, if it be a fact, that our own donation account shows that. So far as I know, all donations made by the Western Fuel Company within the last 8 years appear on the books of the company in one form or another. In answer to the question whether I don't know Mr. Chisholm testified he got \$50 every Christmas, and the books only show one or two payments to him, I will say that I cannot help what Mr. Chisholm testifies; I am answering the questions put to me as I understand them and know the facts. There was no money distributed from the Western Fuel Company to the employees of the Pacific Mail Steamship Company except at Christmas time. That I am positive about. I certainly consider that the giving of coal to Mr. Schwerin was a matter of courtesy. I take the responsibility for receipting, without getting payment, the bills made out against Mr. Schwerin. It is true that the books of the company show that those bills were charged up against Mr. Schwerin and that he was credited with the amount of the bills every once in a while; that was under my authority. I did not do that entirely for the purpose of making it appear, in case anyone should ex-

amine the books, that Mr. Schwerin was paying for the coal, but simply to insure that, if Mr. Schwerin came there in my absence, he would find that the bills were paid and would not be able to pay for the coal himself, and I did not intend that he should pay for it. If Mr. Norcross testified in this case that whenever coal was given by way of donation to anybody that fact appeared in the donation account, I believe he was testifying to the best of his knowledge and belief. I will assume that I heard him afterward testify to the fact that I receipted the Schwerin bills without getting payment. The entry of the amount of coal gratuitously given to Mr. Schwerin in the operating expenses, without setting forth the facts as they actually existed, was a matter for the accounting department. Those amounts were charged up to the operation of the business and that was sufficient. Mr. Schwerin never got his coal gratuitously until about the time of the fire. I do not think that there are any books extant now that were in existence at the time of the fire of 1906. I do not think there is any account with Mr. Schwerin prior to the fire and earthquake of 1906, but I will make this statement: as a matter of fact, all payments of all kinds in the transaction of our business in the way of checks and letters containing checks passed through my hands and Mr. Schwerin sent checks for the payment of his coal prior to the fire of 1906, and I received those checks. I am a very warm friend of Mr. Schwerin and have been for 25 years" (pp. 2202-5).

This case has now been exhaustively reviewed. The argument made to this court for its order remanding the cause for a new trial, called for an exhaustive review of the evidence, and we have essayed to meet the requirement. Upon this court

is now imposed the serious duty, one, we are sure, that will not be abnegated or shirked, of giving the most careful consideration to what counsel have been at such apparent pains to gather and present. The liberty and honor of these citizens are in the hand of the court. There can be no higher responsibility.

The government in this case may not prove the conspiracy set forth in the indictment by attempting to impute some other conspiracy—it will be held to the conspiracy described in the indictment, and if it has failed, as indeed it has failed utterly, to prove that conspiracy, these defendants have the right to another trial. There can be no answer to this contention—we submit it as conclusive.

But we have gone beyond the exigencies of the case. We have reviewed this evidence from the standpoint of any imputed conspiracy to defraud, whether described in the indictment or not, and we have shown, it is submitted, from this record and by this record, as the result of painstaking examination and study, and with what we conceive, with deference, to be frankness and fairness of presentation, that there is no evidence substantial in character, there is none whatever, to fasten upon these defendants the accusation that they conspired, in any manner, or from any point of view, to defraud either the United States or the Pacific Mail Steamship Company. Under any indictment, not the one the case proceeded upon but any indictment, the charge has broken down.

“There was a legal presumption”—we recall the language of the Circuit Court of Appeals for the 8th Circuit, (*U. P. Coal Company v. United States*, 173 Fed. p. 740), supported by the citation of many cases, federal and state,

“that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt, is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.”

And the language of the Supreme Court of the United States, in *Clyatt against United States*, 197 U. S. pp. 221-3, bears a weighty admonition here to all of us, in presence of the wrong, the miscarriage, and the tragedy bound up with the conviction of these defendants below; the Supreme Court said:

“While no motion or request was made that the jury be instructed to find for defendants, and although such a motion is the proper method of presenting the question whether there is evidence to sustain the verdict, yet *Wiborg against United States*, 163 U. S. 632, 658, justifies us in examining the question, in case a plain error has been committed in a matter so vital to the defendants.”

The court proceeds to comment on the evidence in the case, and concludes:

“We have examined the testimony *with great care* to see if there was anything which would justify a finding of the fact, and ‘can find nothing. No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the *imperative duty* of a court to see that all the elements of his crime are proved, or at least that testimony is offered *which justifies a jury in finding those elements*. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained. We are constrained, therefore, to order a reversal of the judgment, and remand the case for a new trial.”

III.

The Denial of the Motion for New Trial Was an Abuse of Discretion.

The granting or denying of a motion for new trial in the federal courts is ordinarily a matter of sound discretion with the trial judge, not, therefore, reviewable in the appellate court. But to this rule there is an exception, as well settled as the rule itself, that the rule will not be applied where the allowance or refusal of the motion results from a clear abuse of discretion. In the Circuit Court of Appeals for the Third Circuit, it was held in *James against Evans*, 149 Fed. 136, 141:

“While it is a general rule that the allowance or refusal of a new trial rests in the sound

discretion of the court, and will not be interfered with on a Writ of Error, it is well settled that this rule has no application where such allowance or refusal results from a clear abuse of discretion."

And in the Circuit Court of Appeals for the Ninth Circuit, in *Charlton against Kelly*, 156 Fed. 433, 438, the general rule is declared, and held to apply, for the reason, as pointed out at large in the opinion, that "in the present case, there was clearly no abuse of discretion".

And in the Circuit Court of Appeals for the Fourth Circuit, in *Atlantic Coast Line Railroad Company against Thompson*, 211 Fed. 889, 892, it was said:

"The well-known rule of federal practice derived from the common law is, that the granting or refusing a new trial is in the discretion of the trial judge, and that his action is not reversible by writ of error. *Neucomb against Wood*, 97 U. S. 583. To this rule an exception has been allowed, where the conclusion of the trial judge involved clear error of law which could not be corrected by assignment of error for anything done in the course of the trial."

And in the Circuit Court of Appeals for the Sixth Circuit, in *Pugh against Excursion Company*, 177 Fed. 400, the court said:

"It is the general rule that the granting of a new trial is a matter of discretion, and will not be reviewed. But it is not so where the verdict is inconsistent on its face, and shows the abuse of power on the part of the jury. If the granting of the motion is a positive duty,

it is not discretionary. If it is necessary to correct a mistrial, it becomes a positive duty to set aside the erroneous proceedings and grant a new trial."

If this positive duty to correct a mis-trial and to set aside an erroneous proceeding, has not been fulfilled by the trial court, it ceases to be a case, within the general rule, of irreviewable discretion, it becomes the abuse of discretion, and the court of appeals, as it did in the case last cited, will itself fulfil the duty and award the new trial. "The discretion", as said by the Circuit Court of Appeals for the Second Circuit, in *Central Trust Company against Chicago, etc. R. Co.*, 218 Fed. 336, 339, "however, must be exercised in accordance with recognized judicial standards". And in that case an order, discretionary as of the general rule, was reviewed and reversed.

In the case at bar, the denial of the motion for a new trial was an abuse of discretion, for the reason, first, that there was no evidence, substantial or at all, of the conspiracy charged in the indictment, or, for the matter of that of any conspiracy, alleged or not, to defraud the United States in any way. It is futile to say that a trial judge, who denies a motion for new trial after a conviction in such a case, has exercised a "sound" discretion, a discretion "in accordance with recognized judicial standards," or any discretion whatever. The language of Judge Taft, speaking for the Circuit Court of Appeals of the Sixth Circuit, in *Felton against*

Spiro, 78 Fed. 576, 581, a case in which the trial judge declined to consider whether the verdict was against the great weight of the evidence—is apposite here. It is just as apposite here as there, for here, the trial judge denied the motion for a new trial, when the evidence in the case, as we have shown upon the fullest consideration, was utterly lacking to substantiate either the conspiracy which the indictment went upon, or, regardless of the indictment, any conspiracy to defraud the United States. Judge Taft said:

“A motion for a new trial is, of course, addressed to the discretion of the court, and, if the court exercises its discretion, and either grants or denies the motion, its action is not the subject of review. This is so well settled that it is unnecessary to cite authorities upon the point. But the motion for new trial is a remedy accorded to a party litigant for the correction by the trial court of injustice done by the verdict of a jury. It is one of the most important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury. If, now, in exercising this discretion, it is the duty of the court to consider whether the verdict was against the great weight of the evidence, and he refuses to consider the evidence in this light on the ground that he has no power or discretion to do so, it is clear to us that he is depriving the party making the motion of a substantial right, and that this may be corrected by writ of error.”

The denial of the motion for a new trial was an abuse of discretion for a second reason: It was clear error of law for the trial judge, in face of the motion, to permit the verdict to stand where such verdict, it was made to appear, had been extraneously influenced by misconduct; and the error thus noted

“could not be corrected by assignment of error for anything done in the course of the trial.”

*Atlantic Coast Line Railroad Company
against Thompson, ubi supra.*

On motion for new trial, the affidavit of J. H. Bromberger, one of the trial jurors, was read, and it sets forth the misconduct of Fred Becker, also one of the trial jurors, committed while the case was on trial and as much as a week before the end of the trial. Juror Bromberger says:

“I was one of the trial jurors on the above-entitled case. A week or more before the end of the trial Mr. Fred Becker, another of the jurors, gave to a number of the jurors, including myself, a copy of the Oakland ‘Tribune’ containing a piece about the Sugar Cases in the East, and appearing in that part of the ‘Tribune’ written by the ‘Knave’. Mr. Becker showed the jurors the particular item and asked them to read it, saying it was a similar case, the only difference being that one was sugar and the other coal.

According to my recollection this article was handed to Mr. Beans, Mr. Bollander, Mr. Gatlery, and Mr. Long, and it may have been handed to others. I received and read the article myself before the court had taken up, and it was handed to me either directly by Mr.

Becker or through Mr. Gatley. In any event Mr. Becker was present because I saw him pointing out the article *and remarking about the similarity in the cases*" (pp. 2299-2300).

The affidavit of Mr. Bromberger sets out the article, which appeared in the Oakland "Tribune" of Sunday February 8, 1914 (p. 2300). We set this publication out, and it will be recalled to the memory of the court, as the court reads it, that the indictment in the case at bar proceeded, in very terms, upon an alleged manipulation of the scales. The heading is: "RECALLS SUGAR FRAUD HISTORY". The article proceeds:

"Winfred T. Denison, the new Secretary of the Interior for the Philippines, recalls some sugar fraud history in the East in his address at the Palace, a week ago, before the Commonwealth Club. The suit was against the Have-meyer Sugar Trust *for sugar weighing frauds*. Denison acted in this famous case as Assistant United States Attorney General. *By manipulating the scales*, it was shown the trust *defrauded* the government in ten years *out of four million five hundred thousand dollars in duties*. As a result of the suit, *it had to pay back this large sum to Uncle Sam*. Denison said *this and other evils* were due to the 'spoils system'. The trust gave regular contributions *to both parties* and expected *a ten-fold return one way or another*. The new Philippine official did not go into the details of the fraud suit, but if I recall correctly *one of the men he sent to the penitentiary at Atlanta for two years*, was Oliver Spitzer, who had been *the superintendent of docks* for the American Sugar Refining Company, commonly alluded to as the trust. After he got out *Spitzer admitted*

the steel springs used to manipulate the scales on the dock were his invention. He said he had not confessed at his trial for two reasons. He thought *nothing could happen to the trust*, believing it so strong the government could do nothing with it. He also remarked:

‘I was advised to confess. I said the only confession I can make *will carry me into a cemetery.*’

‘You are referring to one of the trust magnates’ asked the lawyer.

Spitzer said ‘yes’ ” (pp. 2300-2301).

This same newspaper article, set out in Mr. Bromberger’s affidavit, was also handed to another juror, William K. Beans, to read, and by the same juror, Fred. Becker, who gave it to Mr. Bromberger. Mr. Beans’ affidavit is as follows:

“That he was one of the jurors impaneled to try the above-entitled cause.

That about ten days prior to the time when said cause was finally submitted to the jury for its verdict Fred Becker, another one of the jurors who tried the above cause, *handed to affiant to read* a newspaper article referring to, or containing, *a series of articles distinctly hostile to the defendants herein*, commenting at some length in a manner adverse to their defense herein, and *likening this case to the American Sugar Refining Company case in New York*, in which some of that company’s officers or employees *had been convicted for false weighing*. Said Becker had previously given these articles to several other of said jurors to read, and some of them had read the same, and said Becker told affiant at the time of handing him said articles as aforesaid *that he ought to read them*. Affiant merely glanced

at said articles *observing their character*, and on the following morning returned them to said Becker without further reading them. Affiant is not able at this time to state in what paper said article or articles were published, nor can affiant repeat the language thereof. About said time *Thomas C. Maher*, another of said jurors, *told affiant that this case was similar to said American Sugar Refining Company case.*

That affiant during the trial hereof read the articles then appearing in the San Francisco 'Examiner' regarding this case.

That said Becker told affiant at the time said newspaper article was handed affiant what were the contents of said article, *that it referred to the sugar frauds, saying that the sugar people were crooked, and that the Western Fuel people were operating along the same lines.*

That the article hereinabove referred to was lengthy and was partly printed in type larger than that ordinarily used in newspapers, and was contained on the front page and according to affiant's recollection also on a subsequent page of said newspaper" (pp. 2308-9).

The affidavit of Mr. R. E. Herdman, a trial juror, also brings in this same Fred Becker. Mr. Herdman's affidavit is as follows:

"I was one of the trial jurors on the above-entitled case. *After the case had been submitted to the jury and while we were in the jury-room, but before we had reached a verdict, Mr. Fred Becker, another of the jurors said to me: 'Now, Mr. Herdman, I presume that you read the daily papers, the same as I do,' and I told him that I read most of them every day*" (pp. 2302-3).

The affidavit of William Long, a trial juror, refers to the same Thomas C. Maher, like Fred Becker a juror in the case, who, as Mr. Beans states, "told affiant that this case was similar to said American Sugar Refining Company case"—Maher making this statement about the time when Fred Becker handed Beans the newspaper article mentioned in the affidavits of Bromberger and Beans. Mr. Long says:

"One day *about a week before the trial ended* I heard the 'Colonel', as we all called Mr. T. F. Maher, *talking about the sugar cases*. This was outside in the hall and *just before two o'clock*. I was late that day and got there *toward the last of the conversation*. He was telling a number of the other jurors something about the case, and how they got one of the men involved, but this man kept his mouth shut and they could not get the others, but he said they convicted one of them" (pp. 2303-4).

The affidavit of Joseph Stackler, another trial juror (p. 2305), also brings in this same Maher. Mr. Stackler's affidavit is as follows:

"A week or more before the close of the trial of the above-entitled case, a group of the jurors were standing in the hallway outside the door of the courtroom discussing the case on trial and the sugar case back east. It was shortly before 2 o'clock in the afternoon that this discussion took place, and Mr. Maher, another of the jurors, did most of the talking according to my recollection.

I do not remember the exact words used, but the substance of them was that *the Sugar Company and the Western Fuel Company were big corporations*, and that *all these big corpora-*

tions did business along the same lines, and that all of them gave commissions or contributions, and that the Sugar Case was a similar case, only one company was handling sugar and the other coal.

My recollection is that Mr. Bollander was also present and did some of the talking, but *the chief speaker* was Mr. Maher, *and I think that Mr. Becker was also present*, but I did not see the article in the 'Tribune' and I do not think it was being shown to the jurors *at that time*" (p. 2306).

Maher and Becker both make affidavits. Maher expressly corroborates Mr. Bromberger, first as to the circumstance that the newspaper article mentioned in Mr. Bromberger's affidavit was introduced to the notice of jurors by Fred Becker, and secondly that this paper came from Becker to Bromberger, not directly, however, according to Maher, but through Maher to whom the paper had been given by Becker. Maher distinctly says that it was after Becker had brought this paper to the trial, and had given it to Maher, that Mr. Bromberger requested him to let him see it—Mr. Bromberger, it will be remembered, having stated that Becker asked the jurors to read the particular article (p. 2300). Maher further says that Mr. Bromberger returned the paper to him, and that he returned it to Becker without having read it or commented upon it. It follows from this, that Becker was circulating this paper, giving it first to one juror and then to another, while the case was on trial; for Becker admits, as we shall show, that he handed

this article to Mr. Beans, he does not deny that he gave it to Bromberger indirectly through Maher, he does not deny that he gave it to Maher, and that Maher gave it back to him, and Maher says that Becker did give him the article, and that he gave it to Bromberger; and it appears further, from the affidavit of Mr. Beans, that Becker handed the article to him. We quote from Maher's affidavit in terms (p. 2471):

"Said juror, J. H. Bromberger, is mistaken in stating that the juror Fred Becker gave to him a copy of the Oakland 'Tribune' containing a piece about the sugar case in the East and appearing in that part of the 'Tribune' written by The Knave. The paper referred to *had been given by Mr. Becker to me. Subsequently Mr. Bromberger requested me to let him see the paper, and I handed the paper to him.* I do not recall the exact date upon which this transaction occurred but I do remember that it was during one morning *prior to the noon recess of said court. During the noon recess of the day, and on Market street, Mr. Bromberger returned the paper to me and I placed it in my pocket. Thereafter, and on the same day and before court convened for the afternoon session and while in the corridor of the Post Office Building connecting with said courtroom, I returned the paper to Mr. Becker without having read it and without making to the said Becker any comment thereon*" (pp. 2471-2).

Maher makes a formal denial (p. 2472) of the statements in reference to the Western Fuel Company and the Sugar Company, with which he had been charged by jurors Stackler (p. 2306) and Long (pp. 2303-4); but he does not deny the state-

ment made by juror Beans that about the time when Becker gave this newspaper article to Beans "Thomas C. Maher, another of said jurors, told affiant that this case was similar to said American Sugar Refining Company case" (pp. 2308-9).

Juror Gatley says that this newspaper article was not shown to him by Becker, nor did he read it, and neither Becker nor Maher said anything about it in his presence (p. 2474). Juror Bolander makes an affidavit, word for word, like the affidavit of Gatley (pp. 2477-8).

This leaves the affidavit of Becker. It reads as follows:

"I was one of the jurors impaneled to try the above-entitled action, and by whom said action was tried. I have read the affidavit dated March 6th, 1914, made by *William K. Beans*, who was also one of said jurors impaneled to try said action, and by whom said action was tried.

"The verdict of the jury in said action was rendered on the night of *the 17th day* of February, 1914. On or about the *9th day* of February, 1914, *I did hand to affiant a newspaper article to read*, which newspaper article referred to the *American Sugar Refining case*, in *New York*" (pp. 2485-6).

At this point in the affidavit, Becker undertakes to state his opinion or conclusion as to the construction and effect of the newspaper article. The opinion of Mr. Becker as to the interpretation of a writing, is not evidence, it is not binding upon anyone, it is not admissible. But it has a significance, for it brings out the manifest impression

which the article made on Juror Beans, and which, as we shall show from Becker, it was Becker's purpose to convey. To make this clear:—

Mr. Beans states in his affidavit that Becker "handed to affiant a newspaper article" (p. 2308).

Mr. Beans

"is not able at this time to state in what paper said article or articles were published, nor can affiant *repeat the language thereof*" (p. 2308).

But if Mr. Beans cannot repeat the language, he does give the impression made upon him, the effect upon his mind, of the article, what it meant for him. He says:

"Fred Becker, another one of the jurors who tried the above cause, handed to affiant *to read* a newspaper article referring to or containing, *a series of articles distinctly hostile to the defendants herein*, commenting at some length *in a manner adverse to their defense herein*, and *likening this case to the American Sugar Refining Company case in New York* in which some of that company's officers or employees *had been convicted for false weighing*" (p. 2308).

Becker's affidavit simply prefaces this language of Beans with the introductory clause, "it is not true"—thus:

"It is not true, however, that said newspaper contained a series of articles, or any article, distinctly or at all hostile to the defendants in the above-entitled action, or any of them, or that said article commented in any manner, shape or form on the defense of the defendants, or any of them, in this case, or likened this case to

said American Sugar Refining Company case in New York, or to any other case" (p. 2486).

This part of the Becker affidavit may be an attempt, a somewhat sorry one, to impose an innocuous interpretation upon a writing, but it leaves unqualified and unimpaired the fact that this newspaper article created in the mind of Mr. Beans the impression which Mr. Beans has expressed in his affidavit.

Becker's affidavit now sets out the newspaper article, as we have already set it out, and accompanies it with the statement that it was published in the Oakland "Tribune" on February 8, and that this was a *Sunday morning* issue of the paper (p. 2486). Becker then states that he resides, and has resided for many years, in Oakland, and he then makes this statement:

"*Daily* during the trial of the above-entitled action, in traveling from the City of Oakland to the City and County of San Francisco where said trial was in progress and where the above-entitled court held and still holds its session, I was accustomed to take with me and read *daily* newspapers, among which was the said Oakland 'Tribune,' for which newspaper I am now, and for many years last past have been a subscriber" (p. 2488).

But Becker was not "traveling from the City of Oakland to the City and County of San Francisco where said trial was in progress and where the above-entitled court held its session"—on Sunday morning, or at any time, morning, afternoon or evening, on Sunday; and if he "was accustomed

to take with me and read daily newspapers, among which was said Oakland 'Tribune' ", and did in fact take with him the Oakland "Tribune" for Monday morning—"to take with me and read—" he does not explain why, in addition to Monday's "Tribune", he found it necessary to take to the Court room and into the jury, the Sunday "Tribune", which he read on Sunday, and which contained this article.

And when, on Monday morning Becker "traveled" from Oakland to the court room in San Francisco, he says that he had with him, not the Sunday issue of the "Tribune" but a portion of that issue—what portion?

"On the morning of February 9th, 1914, or February 19th, 1914 (it was February 9th), I had with me *that portion* of said *Sunday* edition of said Oakland 'Tribune' of February 8th, 1914, entitled: '*The Knave*', the whole of which article I *had* read".

He now goes on to admit that he gave the article to Mr. Beans *to read*, and not necessarily on Monday, the 9th of February, it may have been the 10th. "While outside of the court-room," on the morning of said 9th or 10th days of February, 1914, I did call the attention of said William K. Beans to said article, and gave it to him *to read*", and he must have given that article to Maher,—who, in turn, says he gave it to Juror Bromberger,—before giving it to Mr. Beans; for Becker's statement is that Mr. Beans did not return the article to him, that it was never returned to him, admitting,

however, that he gave the article to Maher. This is what he says:

“At no time did I give or show said article to any of the other jurors engaged in the trial of said action, *excepting Juror Maher*. Said newspaper article was the *only* article which I ever gave to said William K. Beans to read, or to which I called his attention during said trial. Said William K. Beans is in error when he states that the following morning he returned said newspaper article to me. Said newspaper article was never returned to me, nor was it afterwards seen by me until within the past few days when my attention was directed to it in connection with the making of this affidavit” (p. 2488).

He adds that at the adjournment of court, on the day after he gave the article to Beans, this juror apologized to him for not having returned the article, and said he would return it next morning—this, while Becker and Beans were crossing the Bay to the Oakland side. “I told him that he need not mind because I *had read* the article and did not care anything further about it;” and he repeats, that the newspaper article was never returned to him (p. 2489).

And finally, Becker denies the statement which Beans charges him with having made when he gave Beans the paper to read, “that the Sugar people were crooked, and that the Western Fuel people were operating along the same lines” (pp. 2489, 2309).

What possible motive or purpose could Becker have had, after having read this article at his home

in Oakland on Sunday, in bringing that article across the bay with him to the courtroom on Monday, and, on Monday or Tuesday, giving that article to Maher, "calling the attention" of Beans to that article, and "giving it to him *to read*"—what motive or purpose, except to point out the alleged similarity in the sugar and coal cases? "It is not open to reasonable doubt" (*Mattox against United States*, 146 U. S. p. 150). More than that, Juror Bromberger, in making affidavit that this article was handed to Mr. Beans and to some other jurors, and that it was handed to him either directly by Becker or through Juror Gatley, goes on to say:

"In any event, Mr. Becker was present, because I saw him *pointing out the article and remarking about the similarity in the cases.*"

Becker does not deny that he handed the article to Beans at least, he does not deny that it came to Bromberger from him through another juror to whom he had given it, whether Maher or Gatley; and he does not attempt to deny, at any place in his affidavit, the statement of Juror Bromberger—he makes no reference whatever to it—that Becker was "pointing out the article and remarking about the similarity of the cases"; nor does he anywhere deny the statement of Beans, that he, Becker, said to him that he "ought" to read that article—"Becker told affiant," Beans says without denial from Becker, "at the time of handing him said articles as aforesaid, *that he ought to read them*" (p. 2308). If Becker had been specially engaged for the

work,—we are not intimating at all that he was,—he could not have been a more industrious missionary.

The trial of this case began on December 9, 1913; the verdict was returned February 17, 1914 (pp. 17, 54). It was on trial two months and over. About a week before the case went to the jury, and when the substance of the evidence had been delivered and heard, Becker, under the circumstances pointed out, introduces this newspaper article into the jury. The article has the capitalized and suggestive heading: "RECALLS SUGAR FRAUD HISTORY" (p. 2300). It begins by referring to an address made in San Francisco, before the Commonwealth Club, while the trial of the case at bar was going on, and just a week before the publication in the "Tribune"—an address by Winfred T. Denison, described as being the new Secretary of the Interior for the Philippines, and as having acted as Assistant United States Attorney General in a suit against the Sugar Trust for *sugar weighing frauds*. The language of the article is:

"Winfred T. Denison, the new Secretary of the Interior for the Philippines, recalls some sugar fraud history in the East in his address at the Palace, a week ago, before the Commonwealth Club. The suit was against the Have-meyer Sugar Trust for *sugar weighing frauds*. Denison acted in this famous case as Assistant United States Attorney General" (p. 2300).

In our references to the Heike case, both in the Circuit Court of Appeals and in the Supreme Court

of the United States, it was pointed out that the indictment and the proof went upon the tampering with the scales on which imported sugar was weighed by the custom-house at the port of New York, and we referred to the language of the Supreme Court, commenting upon the secret insertion of steel springs in the scales, in aid of the fraudulent manipulation. And in the case at bar, the indictment proceeded, as we have already quoted, upon the fraudulent manipulation of the scales—

“Scales and weights which were to be and were *fraudulently manipulated* by the defendants to the end that *said scales* should record the *weights* of said coal desired by the defendants, and *not the true weights* of the coal *placed thereon*, and the said defendants did so *manipulate said scales and weights* and the method of *weighing thereon*, so that said scales and weights did record the weights of coal desired by said defendants, and not the true weight of the coal *so placed thereon*” (p. 7).

Now, then, this Becker article continues:

“*By manipulating the scales*, it was shown the trust *defrauded* the Government in ten years *out of four million five hundred thousand dollars in duties*. As a result of the suit, *it had to pay back this large sum to Uncle Sam*. Denison said *this and other evils* were due to the ‘Spoils system’. The trust gave regular contributions *to both parties* and expected *a ten-fold return one way or another*. The new Philippine official did not go into the details *of the fraud suit*, but if I recall correctly *one of the men he sent to the penitentiary at Atlanta for two years*, was Oliver Spitzer, who had been *the superintendent of docks* for the American Sugar Refining Company, commonly

alluded to as the trust. After he got out *Spitzer* admitted the steel springs used to manipulate the scales on the dock were his invention. He said he had not confessed at his trial for two reasons. He thought *nothing could happen to the trust*, believing it so strong the Government could do nothing with it. He also remarked:

‘I was advised to confess. I said the only confession I can make *will carry me into a cemetery.*’

‘You are referring to one of the trust magnates,’ asked the lawyer.

Spitzer said ‘yes’ ” (pp. 2300-2301).

In *Mattox against United States*, 146 U. S. 140, 149, 150, the Supreme Court, in a capital case said, in language equally applicable to the case at bar:

“It is vital in capital cases that the jury should pass upon the case *free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated.*”

And further:

“The text books refer to many cases in which the action of the officer having a jury in charge, when prejudice might have resulted; or *unauthorized communications having a tendency to adverse influence*; or the reading of newspapers containing imperfect reports of the trial, or *objectionable matter* in the form of editorial comments or otherwise, have been held *fatal to verdicts.*”

In this *Mattox* case, a newspaper article, set out in full at pages 143-4 of the case, and summed up

in the opinion of the court at pages 150-151, had been introduced into the jury room—"was read to the jury in their presence and hearing". It does not appear that any juror commented upon this newspaper article, or remarked to a fellow juror upon its correspondence to the facts of the case they were trying, or stated to any other juror that he "ought" to read it. Nor, regard being had to the indictment in the case at bar, and to the theory of manipulation of the scales upon which that indictment proceeded, was there anything in the Mattox article like the concrete particularity and directness of reference which we have pointed out in the Becker article. The Mattox article (pp. 143-4, Mattox case, *supra*) stated that if Mattox was not found guilty, he will be a lucky man, for the evidence against him was very strong, "or at least appeared to be to an outsider"; also that "it was expected" that the deliberations of the jury would not last an hour, but that ten hours had gone by and a verdict was not reached "by 10:30 last night, when the jury adjourned".

The attorney for the defendant, it was said, "made an excellent speech in his behalf to the jury". The district attorney "also made a fine speech", one of the best and most logical he ever made—"it was so strong that friends of Mattox gave up all hope of any result but conviction * * *" nevertheless, "when the jury filed out, Mattox seemed to be the most unconcerned man in the room".

The mother of Mattox is referred to:

“His mother was very pale and her face indicated that she had but very little hope; she is certainly deserving of a good deal of credit, for she has stuck by her son, as only a mother can, through all his trials and difficulties, and this is not the first one by any means, for Clyde has been tried for his life once before.”

The inference is left to be drawn that on this former occasion, he had been acquitted. It is further said, and it is the only comment upon the actual case on trial,

“nobody saw him do the killing, and the evidence against him is purely circumstantial, but very strong, it is claimed, by those who heard all the testimony.”

This was the entire publication. The Supreme Court of the United States sums it up and characterizes it as follows:

“The jury in the case before us retired to consider of their verdict on the 7th of October, and has not agreed on the morning of the 8th, when the newspaper article was read to them. *It is not open to reasonable doubt that the tendency of that article was injurious to the defendant.* Statements that the defendant had been tried for his life once before; that the evidence against him was claimed to be very strong by those who had heard all the testimony; that the argument for the prosecution was such that the defendant’s friends gave up all hope of any result but conviction; and that it was expected that the deliberations of the jury would not last an hour before they would return a verdict, *could have no other tendency*” (pp. 150-151).

In the case at bar, the newspaper article in question was handed to jurors by one of their own number, who had been sitting with them for weeks hearing the testimony of the government and of the defense, and in whom they would naturally repose confidence, to whose suggestion they would naturally be moved to accord serious attention. Becker could have no purpose in giving this article to jurors "to read" except to create in their minds the impression of the similarity of the two cases, the one "for sugar weighing frauds", the other for alleged coal weighing frauds. And the affidavit of Juror Bromberger stands undenied that Becker was "pointing out the article and remarking about the similarity in the cases"; and in addition to that, the affidavit of Juror Beans is undenied, that when Becker gave him the articles "to read", Becker told Beans "that he *ought* to read them". But one impression could have resulted, the impression, namely, described by Juror Beans in respect to the article, as being "distinctly hostile to the defendants herein, commenting at some length in a manner adverse to their defense herein, and likening this case to the American Sugar Refining case in New York, in which some of that company's officers or employees had been convicted for false weighing" (p. 2308). The article itself does not in terms liken the sugar case to the coal case, but that was the thing that Becker had in mind when he gave the article to Beans "to read"; when he was "remarking about the simi-

larity in the cases; and when he was telling Beans “that he *ought* to read them”, what other impression could have been made except the one described by Beans—“it is not open to reasonable doubt” (Mattox case, *ubi supra*). The article was headed—“RECALLS SUGAR FRAUD HISTORY”; it tells of its authoritative source—the Secretary of the Interior for the Philippines, who “recalls some sugar fraud history in the East”, in a public address, made in San Francisco, while this very case was being tried, and only a week before Becker was submitting the article to fellow jurors. The suit in question is said to be “against the Havemeyer Sugar Trust for *sugar-weighting frauds*”, and Denison is said to have been the government counsel in that case. What was shown in that case, according to this article? “*By manipulating the scales*, it was shown the trust defrauded the government in ten years, *out of four million five hundred thousand dollars in duties.*” And it is said further, that the government won the suit, and the sugar trust had to pay all this money back to the government. The further information is given that more than one of the men tried by Denison went to the penitentiary; that one of them named Spitzer, “the superintendent of docks” for the Sugar Company, served two years in the penitentiary at Atlanta; and that this same Spitzer, after serving his term, “admitted the steel springs used to manipulate the scales on the dock were his invention”. And Spitzer is said to have given two reasons for not having confessed at his trial—first because he

thought the trust was all-powerful, and second, "I was advised to confess; I said the only confession I can make will carry me into a cemetery"—the reference being to one of the trust magnates.

Think of Becker giving such an article as this to jurors to read, in such a case as the one at bar, after the case had been on trial for weeks, and was approaching its final submission to the jury. Think of Becker handing this article to jurors "to read"; "remarking about the similarity in the cases"; telling the juror that he "ought" to read it. "It is not open to reasonable doubt", as the Supreme Court said in the *Mattox* case, "that the tendency of that article was injurious to the defendant"—such an article hawked about under such circumstances,—we again borrow the language of the Supreme Court—"could have no other tendency".

But there is a stock formula, incorporated, *in totidem verbis*, in the affidavits of some seven of the jurors, to the point that none of the newspaper articles, including this Becker article, influenced their judgment in arriving at a verdict—on the assumption, evidently, that such a statement by the juror was admissible to support the verdict. We quote the formula from Becker's affidavit (p. 2489):

"I state positively and unequivocally that none of the newspaper articles relating to the trial of the above entitled action, or to any of the parties or witnesses connected therewith, or commenting upon or relating to any of the issues involved in said action, or said article

above referred to, in any way affected or influenced my judgment in arriving at a verdict in said action. The verdict of said jury, so far as I was concerned, was based entirely and exclusively upon the evidence introduced during said trial, the instructions given by the Court to the jury, and the observations made by me while inspecting a portion of the premises in the possession of the Western Fuel Company, in company with the other jurors, and Hon. Maurice T. Dooling, judge presiding on the trial of said action" (p. 2489).

These stereotype statements are entitled to no consideration whatever, they are incompetent and inadmissible, they must be disregarded. In the case of *Woodward v. Leavitt*, 107 Mass. 453, in an opinion by Mr. Justice Gray, written upon very full consideration, it is said:

"Where a paper, which is capable of influencing the jury on the side of the prevailing party, goes to the jury by accident and is read by them, the verdict will be set aside, although the jury say that they were not influenced by such paper, for it is impossible for them to say what effect it may have had on their minds."

And again:

"If the jury received and read the paper, they could not be permitted to testify upon the point whether it did or did not actually influence them."

And again:

"But where evidence has been introduced tending to show that, without authority of law, but without fault of either party or his agent, a paper was communicated to the jury, which

might have influenced their minds, the testimony of the jurors is admissible to disprove that the paper was communicated to them, though not to show whether it did or did not influence their deliberations and decision. A juryman may testify to *any facts* bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind."

This Massachusetts case was approved and followed by the Supreme Court of the United States, in *Mattox against United States*, 146 U. S. p. 149, as being "conformable to right reason and sustained by the weight of authority." The Supreme Court said:

"The subject was much considered by Mr. Justice Gray, then a member of the Supreme Judicial Court of Massachusetts, in *Woodward v. Leavitt*, 107 Mass. 453, where numerous authorities were referred to and applied, and the conclusions announced 'that on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors *as to the motives and influences* which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a juryman may testify to *any facts* bearing upon the question of the existence of any extraneous influence, *although not as to how far that influence operated upon his mind*. So a juryman may testify in denial or explanation of *acts or declarations* outside of the jury room, where evidence of such acts has been given as ground for a new trial.' See, also, *Ritchie v. Holbrooke*, 7 S. & R. 458; *Chews v. Driver*, 1 Cox (N. J.) 166; *Nelms v. Mississippi*, 13 Sm. & Marsh. 500; *Hawkins v. New Orleans Printing Co.*, 29 La. Ann. 134, 140; *Whitney v. Whitman*, 5 Mass. 405; *Hix v. Drury*, 5 Pick. 296.

We regard the rule thus laid down *as conformable to right reason and sustained by the weight of authority.*"

And in the Supreme Court of this State, 156 Cal. p. 397, in the case of *Kimic against Ry. Co.*, it is said:

"The statements in the counter affidavits of eleven of the jurors 'that he was governed entirely in his deliberation and in reaching said verdict by the evidence introduced at the trial thereof, and that no outside fact or circumstance influenced him in his deliberation or verdict,' were ineffectual for any purpose. It is thoroughly settled that jurors cannot be heard to deny the prejudicial influence on their minds or knowledge acquired by misconduct. (People v. Stokes, 103 Cal. 193; People v. Chin Non, 146 Cal. 562). Affidavits of jurors may be used to disprove or explain the alleged misconduct but cannot, admitting the misconduct, be used to show that the verdict was not influenced thereby. (People v. Stokes, 103 Cal. 193.)"

We pass, now, to a second and added phase of misconduct, made apparent, as in the phase just considered, by affidavits on motion for new trial, and not open "to be corrected by assignment of error for anything done in the course of the trial" (*Atlantic Coast Line Railroad Company against Thompson*, heretofore noted, 211 Fed. 889, 892).

The very able special counsel for the government, Mr. Roche, in his speech to the jury—which has been assigned for error and misconduct,—said *inter alia*:

“David Powers finally went down to one of his friends who was connected with one of the newspapers in San Francisco, told him what his situation was, told him then, gentlemen of the jury, some of the facts which have been put in evidence, and which by the way at that time was a public scandal, smelling to the high Heavens, and finally was advised by him, when he told him that he was in fear of being brought before the Grand Jury, that it was his duty to go down and tell the United States Government officials exactly what he knew about these frauds” (p. 2246).

The newspaper friend of David Powers, here referred to, is one Stewart Masters, connected, at the time Mr. Roche speaks of, with the San Francisco “Bulletin”, and connected, at the time of the trial, with the San Francisco “Examiner”, writing up the reports of the trial to which we shall have occasion to advert.

David Powers tells of his relations with Masters, and also with Gleason, another “Bulletin” reporter:

“Q. At whose request did you go to Mr. Tidwell’s office?

A. At the request of Mr. Masters.

Q. Mr. Masters was at that time, as you have testified, connected with the ‘Bulletin’, and he is at the present time a reporter on the ‘Examiner’; is that correct?

A. Yes, sir.

Q. And the Mr. Masters to whom you now refer is the gentleman sitting in this courtroom reporting for the ‘Examiner’?

A. Yes, sir.

Q. Is it or is it not true that before you ever saw Mr. Tidwell and before you ever had any conference of any kind with Mr. Tidwell

you first disclosed to Mr. Masters and to Mr. Gleason and to Mr. Leo Mayer the larger part of the facts and circumstances connected with this case and the smuggling case to which you have referred upon cross-examination?

A. Yes, sir" (p. 840).

We now call the attention of this court to the article in the "Examiner" of December 17, 1913, found at pages 2322-4 of the transcript. We ask the court, as we think it is our right to ask the court, to read that article, its headings and the body of the article; likewise, we ask the court to read the "Examiner" editorial which follows immediately at pages 2324-5.

Again, we ask this court to read the "Examiner" article of December 18th, found at pages 2326-8.

We ask the court to read the "Examiner" article of December 24, 1913, found at pages 2332-3.

We ask the court to read the "Examiner" article of January 8, 1914, found at pages 2339-2340, in which the statement is made of evidence which the trial judge excluded.

We ask the court to read the "Examiner" article of January 27, 1914, found at pages 2372-4; and of January 31, 1914, in which excluded evidence is again referred to and characterized,—pages 2376-8.

We ask the court to read the "Examiner" article of February 8, 1914, pages 2388-2392.

We ask the court to read the "Examiner" article of February 11, 1914, pages 2393-4.

It is not to be understood that these specified articles were the only "Examiner" publications, but they are sufficiently salient to indicate the atmosphere of prejudice in which Masters had enveloped the defendants.

As to the "Bulletin" articles. These articles begin at page 2403 of the transcript, and we ask the court's attention to the first of them, to its heading, and to its statement, and the manner of statement, touching the charges against these defendants (pp. 2403-4); also, the alleged explanation at pages 2407-9.

We ask the court to read the "Bulletin" article of December 16, 1913, at pages 2413-2414.

We ask the court to read the "Bulletin" article of December 17, 1913, at pages 2416-2418.

We ask the court to read the "Bulletin" article of December 18, 1913, at pages 2419-2420.

We ask the court to read the "Bulletin" article of January 8, 1914, in which a statement is made, among other things, of evidence touching the Japanese line, which the court had excluded (pp. 2427-8).

We ask the court to read the "Bulletin" article of January 13, 1914, at page 2432; and of January 14, 1914, at pages 2434 and 2436; also the Bulletin article of January 21, 1914, (p. 2444); also the "Bulletin" article of January 26, 1914 (pp. 2448-9); also "Bulletin" article of January 27, 1914, (p. 2451).

We also call the attention of the court to the newspaper article or cartoon, entitled: "Breaking Even: If the Consumers ever get a chance to sell a ton of coal to the Coal Man." This cartoon is part of the record on this writ of error.

The same observation is to be made on the whole course and tenor of the "Bulletin" articles, as in respect to those that appeared in the "Examiner". The consistently and designedly prejudicial, contemptuous, and offensive character of these publications is readily accounted for, when they are traced, as we have traced them, to their immediate source—to those who were with David Powers from the beginning, and who actually reported the proceedings at the trial. We do not believe that the responsible managers of these newspapers, if time had permitted, and they had been aware of the true situation, would have permitted for a moment the columns of their papers to be betrayed to the purposes of Masters and his like. No man of fairness, knowing the case as this record has made it, can read these articles without being shocked. That they were systematically hostile and injurious to these defendants will admit of no doubt.

Juror Bromberger read these "Examiner" articles (pp. 2298-9); so did Juror Long (p. 2303); Juror Stackler read them (p. 2305); also Juror Beans (p. 2309); also Juror Herdman (p. 2302). Maher does not deny that he read these articles, "Examiner" and "Bulletin"—he implies that he did; so, also, of Becker, Gatley and Bolander. And

Juror Herdman makes affidavit in respect to Becker, without any attempt on Becker's part at a denial. Herdman says:

"After the case had been submitted to the jury, and while we were in the jury room, but before we had reached a verdict, Mr. Fred Becker, another of the jurors, said to me: 'Now, Mr. Herdman, I presume that you read the daily papers the same as I do.' And I told him that I read most of them every day" (p. 2303).

Indeed, we are not required to point, as we have done, to the direct evidence that the jury read these articles. In *Meyer against Cadwalader*, 48 Fed. 32, 36—a case of alleged frauds on the treasury, the court said:

"It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications. *That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it.* Good ground, therefore, here appears for setting aside the verdict."

And in *Morse against Montana Company*, 105 Fed. pp. 345, 346, 347, 348, it was said:

"That these articles were written with the view of influencing in some way the determination of this cause is apparent. The publication thereof was commenced very soon after the commencement of the trial of the cause, and ap-

peared in many of the issues of that newspaper until the trial was terminated, when they ceased. The power of the press to create and mold public sentiment is generally recognized, and cannot be doubted. Public and great private enterprises often resort to it for this purpose. The Independent was a leading newspaper at Helena, and possessed a large circulation in the community where nearly all of the jurors in this case resided, pursued their avocations, and conducted their business ventures. *It cannot be doubted* but that a public sentiment was created favorable to the defendant in this community by these articles, and experience has demonstrated that jurors are influenced much by the views of the community wherein they live. *Some of the jurors acknowledge in their affidavits that they read some of these articles, but deny that they were influenced by them, and one states he considered them as advertisements.* The fact as to whether or not the jurors read these articles could be established by their affidavits, but as to what influence these articles had upon their action as jurors could not be so established. In the case of *Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917, the Supreme Court discussed this question. In it the following is quoted with approval from the decision in *Woodward v. Leavitt*, 107 Mass. 453:

‘That on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations is inadmissible, either to impeach or support their verdict,’ and adds: ‘But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind.’

Under this authority *it was not competent for jurors to prove by their affidavits what influence these articles they read had over them, or what motives actuated them in rendering their verdict.* It does not appear what articles the jurors read, but any of the articles from which the above quotations are taken would have had a tendency to influence a juror and make him partial to the defendant. Some of the jurors, in their affidavits, state that they purposely avoided reading the objectionable articles. How, as to most of them, they could have known that they were objectionable, without reading their headlines, or reading a portion of the articles themselves, it is difficult for the court to apprehend. Take, for instance, the editorial article headed, 'Good News for Helena'. How could any one have learned that it had a bearing on the case without reading it partially or entirely?

In the case of *Meyer v. Cadwalader* (C. C.) 49 Fed. 32, where, upon a petition for a new trial, had under consideration, it appeared objectionable articles concerning the case on trial had been published against the plaintiff, the court held that, *as the articles were published in leading newspapers and widely circulated, it would be presumed they had been read by the jury, and it was held that this presented a proper ground for a new trial.*

It should be noted in connection with this case *that the trial lasted for the greater part of two months, and the jury were allowed to separate when not actually in attendance upon the court.*

In the case of *People v. McCoy*, 71 Cal. 395, 12 Pac. 272, it was held:

'That the reading by a juror, during the progress of the trial, of a newspaper containing any matter in connection with the subject-matter of the trial, which would be likely to

influence him in the performance of his duty, is sufficient misconduct to warrant a new trial' ” (pp. 345-6).

It was suggested in the case just cited, that counsel for the prevailing party were privy to the publications. We are not reflecting on counsel in the case at bar, but we give the language of the court as applied to the case from which we have been quoting:

“Considering the circumstances of this case, it would be presumed that counsel for the defendant had knowledge of these publications. Their attention had been called to one of them by one of the attorneys for the plaintiff in open court. Any one who read the daily papers of Helena at that time could hardly escape reading them. That they were written or instigated by persons friendly to the defendant, their contents leave no room to doubt. I would go further, and hold, however, that if it can be established that the verdict of a jury was influenced by any one, even though not a party to the suit, or a relative or friend of such party, it ought not to stand. The verdict of a jury should be the result of its unbiased action. When a jury is influenced by such articles as are presented in this case, it is difficult to prove who instigated them. It is claimed, however, that the plaintiff ought to have had the parties publishing these articles brought into court and punished for contempt, or ought to have applied to the court for a continuance of the cause on account of the prejudice created by them, and by a failure so to do waived the right to present this question upon a petition for a new trial. It was extremely doubtful as to the right of plaintiff to ask that the publishers of this newspaper be brought into court and

examined upon the charge of contempt" (p. 347).

And further:

"To require a party to a suit, when a newspaper publishes an article calculated to prejudice the jury and community against him, to apply to the court for a continuance, or to be deemed to have waived all complaint on account of such publication, would require an act which I think no court would impose. It ought not to be that a newspaper could force a party to continue his cause by a scurrilous attack upon him, and one calculated to bias a jury against him. He might never be as fully prepared for trial again as at that term. And what guaranty would he have that the same tactics would not be again resorted to at the next term? The time, perhaps, has arrived when the courts should say that the dominating and powerful public press should not be used to influence judicial proceedings—to bias its jurors and intimidate its officers" (p. 348).

In *Callahan against Ry. Co.*, 158 Fed., pp. 994, 995, it was said by the court, quoting from an opinion of Mr. Justice Clifford:

"Any improper influence with jurors may afford sufficient ground for granting a new trial, and it is not necessary that the attempt to influence the jurors should be made by one of the parties nor even by his agent. It is sufficient that it clearly appears that it was done in his behalf, *and it is never necessary to show that misconduct controlled or determined the verdict, providing it was of a character that might have had undue influence*" (p. 994).

And further:

“Jurors must be kept free from all possible influences. When exposed thereto it will not do to inquire into the probability of the extent of the influences, and their effect upon the verdict. There is no safety except in setting aside the verdict in a case where acts and conduct are such that could have influenced the verdict” (p 994).

Finally:

“That the improper influence exerted upon these jurors was in the interest of the defendant is not a matter of doubt; and the court will not stop to weigh with exactness the effect of such influence upon this verdict. It is sufficient to know that it was exerted, and that the verdict might have been influenced thereby. It must be understood that no verdict should be permitted to stand, against which, from established facts, the slightest inference rests that it bears the taint of improper influence exerted by or in behalf of the party in whose favor it is returned. Mattox v. United States 146 U. S. 140, 149” (p. 995).

In the Supreme Court of California, 159 Cal. pp. 526, 527, 528 (*People v. Loung*) the court, quoting from Mr. Justice McKee, says:

“There is no doubt, however, that the reading of newspapers by jurors, while engaged in the the trial of a cause is an inattention to duty which ought to be promptly corrected; and if the newspaper contains any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty, the act would constitute ground for a motion for a new trial. Jurors in a criminal action are sworn to render a true verdict according to the evidence. They can-

not, under the oath which they take, receive impressions from any other source. If it be proved as a fact, or may be presumed as a conclusion of law, that their verdict may have been influenced by information or impressions received from sources outside of the evidence in the case, such a verdict is subject to be set aside on a motion for a new trial" (p. 526).

Quoting from *People against Stokes*, 103 Cal. 196, the court continues:

"It is insisted that a new trial should have been granted, because of misconduct of the jury after they had retired to deliberate upon their verdict. The misconduct charged consisted in the jury reading from a local newspaper an article containing a report of some of the evidence in the case, given at the trial, which included a matter of evidence the court had rejected as inadmissible, and also contained intimations that two of the jurors had been corrupted. The evidence bearing upon the question was given by the officer in charge of the jury. No contrary showing was made by the affidavits of jurors or otherwise. Indeed, conceding that the article was read by them, they could make no showing that would relieve them of the effects of their own misconduct. A juror is not allowed to say: 'I acknowledge the grave misconduct. I received evidence without the presence of the court, but those matters have no influence upon my mind when casting my vote in the jury room'. The law, in its wisdom, does not allow a juror to purge himself in that way" (pp. 526-7).

And finally, quoting from the opinion of Mr. Justice Van Fleet in *People against Leary*, 105 Cal. 490:

“In *People v. Leary*, 105 Cal. 490 (39 Pac. 24), Mr. Justice Van Fleet speaking for the court said (referring to the reading of newspapers by jurors during the progress of a trial): ‘If the matter * * * be such as would from its character, or the manner or connection in which it is stated, be calculated to prejudice or injuriously affect the minds of the jury, a presumption of improper influence arises, and a new trial will be granted, without requiring defendant to show that harm has in fact been done his cause’ ” (p. 528).

IV.

It Was Error for the Special Counsel to Argue the Case to the Jury, on Behalf of the Government, in the Manner to Which Exception Has Been Assigned.

We dislike exceedingly to go into any comment on the very able counsel who represented the government specially at the trial below. The ablest prosecutors will at times be hurried into error through excess of zeal, particularly in a case which took some two months and over to try. But the defendant suffers and is prejudiced all the same. The excerpts from the argument of special counsel will be found, as to the opening argument, at pages 2513-2520; as to the closing argument, at pages 2520-2530.

Lowdon v. United States, 149 Fed. 674, 678, 679;

Hall v. United States, 150 U. S. 76, 81;

Wilson v. United States, 149 U. S. 60, 66-8.

V.

The court erred in refusing to allow the defendants to ask this question on cross-examination of Tidwell:

“Q. Now I ask you, what other matters have you in mind and which you used in that assumption other than these three instances of the ‘Germanicus’ and the ‘Dumbarton’?”

This question and the context in which it was put, will be found at pages 2555-6. Tidwell had instanced the cargoes of these two ships, while testifying concerning the matter of shortage, but had said twice that there were, as well, other matters going to the question of shortage. The very natural question was then put to him by counsel for the defense, as to what those other matters were. This question of shortage was material, Tidwell was the prosecuting witness, and when he made the imputation twice that there were other matters, the defendants were entitled to know what those matters were, and to give such explanation of them as lay in their power.

VI.

The court erred in refusing to allow the defendants to ask this question on cross-examination of Tidwell:

“Q. Then, Mr. Tidwell, do you recall an article appearing in the ‘San Francisco Bulletin’ the day after you commenced this exam-

ination of the books and papers of the Western Fuel Company concerning these books and papers?" (p. 2560).

The defendants were entitled to show that Tidwell, on getting access to the books of the Western Fuel Company, had instigated, without delay, a newspaper article—that went to his animous on cross-examination, and the prosecution cannot avoid responsibility for his conduct.

Morse v. Montana Company, 105 Fed. pp. 346-7.

VII.

The court erred in ruling in the testimony of Freund in the respect assigned for error (pp. 2565-7). Freund had been keeping close watch on the weighing out of the barges, and, on a given occasion, weighed a barge out short. The court, over objection, permitted him to testify that it was sometime after that, some few months, before he got another assignment to weigh draw-back coal. There was neither foundation nor relevancy for the insinuation that the defendants were chargeable with this interval of time between his assignments to the barges; but that was the purpose and that was the insinuation. No such inference, as counsel for defense pointed out, was properly deducible.

VIII.

The court erred in refusing to allow the defendants on the examination of Tidwell, to show

that he had correspondence with respect to the matter of a reward to David Powers (pp. 2590-2592).

The defendants were entitled to probe the relations between the government and David Powers, and any correspondence that Tidwell had upon that subject, was admissible, and it would be material and instructive, and the highest kind of evidence.

IX.

The court erred in refusing to allow the defendants to ask Mr. Mills as to the possibility of the barges overrunning from 20 or 30 to 40 per cent (pp. 2592-3).

The experience of Mills, his competency to answer the question, having been established, the defendants were entitled to his testimony.

Holland v. Zollner, 102 Cal. 633.

It is now submitted that the judgment should be reversed, and that these plaintiffs in error should be given a new trial of the case.

Dated, San Francisco,
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